2

No. 86 1808

Supreme Court, U.S.
FILED
MAY 9 1987
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1986

ROBERT W. COSTIGAN,

Petitioner,

vs.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

WILLIAM F. COSTIGAN
Attorney for Petitioner
180 Maiden Lane
36th Floor
New York, New York 10038
(212) 510-7979

5591
Peta Appellate Printers, Inc. • NJ (201) 257-6850 • (800) 3 APPEAL • NY (212) 840-4640 • MA (617) 542-1114
DC (202) 783-7288 • PA (215) 925-6500 • USA (800) 5 APPEAL

16 1 PP

QUESTIONS PRESENTED FOR REVIEW

1. Does an accused's constitutional right to present witnesses on his behalf include the presentation of expert testimony?

2. Where an attorney refrains from disclosing confidential client information to an inquiring stranger, does due process bar a trial court from instructing the jury that this nondisclosure constitutes "cover-up or concealment" raising a "permissible inference" of guilt?

TABLE OF CONTENTS

Page

Questions Presented for Review i

Table of Contents ii

Table of Citations ii

Opinions Below 2

Statement of Jurisdiction 2

Constitutional Provisions Involved 2

Statement of the Case 3

Reasons for Granting the Writ:

I. An accused's right to present an expert witness stands on the same constitutional footing as his right to present a fact witness 8

II. Due process bars jury instruction on a permissive inference unless it is more likely than not 13

Conclusion 17

TABLE OF CITATIONS

Cases Cited:

Ake v. Oklahoma, 470 U.S. 68 (1985) 11, 12

Contents

Page

Brenner v. Brenner, 281 Pa. Super. 362, 422 A. 2d 510 (1980) 14

Chambers v. Mississippi, 410 U.S. 284 (1973) 9

Crane v. Kentucky, 106 S. Ct. 2142 (1986) 8, 9, 10, 11

Francis v. Franklin, 471 U.S. 307 (1985) 3, 16

Hamling v. United States, 418 U.S. 87, reh. denied, 419 U.S. 885 (1974) 11

Hickory v. United States, 160 U.S. 408 (1896) 16

Jenkins v. McKeithen, 395 U.S. 411 (1969) 9, 12

Kulak v. Nationwide Mutual Insurance Co., 40 N.Y. 2d 140, 351 N.E. 2d 735 (1976) 12

Leary v. United States, 395 U.S. 6 (1969) 15

Marx & Co., Inc. v. Diner's Club, Inc., 550 F. 2d 505 (2nd Cir. 1977) 12

Pennsylvania v. Ritchie, 107 S. Ct. 989 (1987) 10

Sandstrom v. Montana, 442 U.S. 510 (1979) 3, 16

Slater v. Rimar, Inc., 462 Pa. 138, 338 A. 2d 584 (1975) 14

Ulster County v. Allen, 442 U.S. 140 (1979) 15

Contents

Page

United States v. Garber, 607 F. 2d 92 (5th Cir. 1979) 12

United States v. Jensen, 608 F. 2d 1349 (10th Cir. 1979) 12

Washington v. Texas, 388 U.S. 14 (1967) 9, 10

Statute Cited:

28 U.S.C. § 1257 2

United States Constitution Cited:

Sixth Amendment 2, 8

Fourteenth Amendment 2, 3, 8, 10

Other Authorities Cited:

Code of Professional Responsibility:

Disciplinary Rule 4-1 14

Ethical Canon 4 14

Ethical Considerations 4-1 and 4-2 14

I. Goldstein and F. Lane, Goldstein Trial Techniques (1969) 12

Kuhn, Disclosure v. Confidentiality, 29 Cath. L. 356 (Aut. 1985) 15

Contents

Page

Lynch, The Lawyer as Informer, 1986 Duke L.J. 491 (1986) 14, 15

Preserving the Client's Confidences—The Lawyer's Dilemma, 59 Fl. B.J. 13 (June 1985) 15

APPENDIX

Appendix A — Various Criminal Informations and Final Judgments of Sentence of Honorable Angelo A. Guarino Dated July 26, 1984 ..... 1a

Appendix B — Opinion of Honorable Angelo Guarino Dated January 25, 1985 ..... 10a

Appendix C — Memorandum and Order of the Superior Court of Pennsylvania Dated December 6, 1985 .... 60a

Appendix D — Order of the Superior Court of Pennsylvania Denying Application for Reargument Dated February 11, 1986 ..... 64a

Appendix E — Order of the Supreme Court of Pennsylvania Dated September 16, 1986 ..... 65a

Appendix F — Order of the Supreme Court of Pennsylvania Denying Petition for Reconsideration Dated March 9, 1987 ..... 66a

Appendix G — Offer of Proof - Submitted at Trial and Appearing at R2069a 67a

Contents

Page

Appendix H — Offer of Proof - Submitted at Trial and Appearing at R2070a and R2071a 69a

Appendix I — Requested Point for Charge at Trial - Appearing at R2123a and R2124a 72a

Appendix J — Excerpt from Charge of Trial Judge Appearing at R1966a and R1967a 74a

No.

In The

Supreme Court of the United States

October Term, 1986

ROBERT W. COSTIGAN,

Petitioner,

vs.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

Petitioner, Robert W. Costigan, respectfully requests that writ of certiorari be issued to review a decision of the Superior Court of Pennsylvania, entered on December 6, 1985, which affirmed petitioner's convictions of theft by unlawful taking (2 counts), theft by deception (2 counts), theft by failure to make required disposition (2 counts), conspiracy, and aiding consummation of a crime, all arising out of his legal representation of the administrators of a decedent's estate.

OPINIONS BELOW

No opinion was issued by the Supreme Court of Pennsylvania in denying the allowance of an appeal and the Superior Court of Pennsylvania only issued a memorandum, unreported, which is reprinted in the appendix to this petition, *infra*, at Appendix C. The opinion of the Court of Common Pleas for Philadelphia County (Guarino, J.), also unreported, appears at Appendix B.

STATEMENT OF JURISDICTION

The judgment order of the Superior Court of Pennsylvania was issued on December 6, 1985 (Appendix C). Petitioner's timely petition for reargument was denied on February 11, 1986 (Appendix D). A petition for allowance of appeal was duly filed with the Pennsylvania Supreme Court and was denied on September 16, 1986 (Appendix E). A timely petition for reconsideration of the denial was denied on March 9, 1987 (Appendix F). This petition is filed within sixty (60) days of the date of that denial.

This Court has jurisdiction to review the judgment of the Superior Court of Pennsylvania pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

Sixth Amendment, United States Constitution

> In all criminal prosecutions, the accused shall have the right . . . to have compulsory process for obtaining witnesses in his favor, . . .

Fourteenth Amendment, United States Constitution:

> No State shall make or enforce any law which shall

> abridge the privileges and immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. . . .

STATEMENT OF THE CASE

This petition asks the Court to resolve an important issue left open in its prior decisions concerning the accused's constitutional right to present witnesses on his behalf, namely whether that aspect of due process includes a right to present an expert witness. Here, the trial court barred petitioner from presenting critical expert testimony that would have: (1) negated existence of a motive to commit theft; (2) explained that steps taken by the petitioner, which the Commonwealth had urged were criminally irregular, were in fact customary among estate practitioners; and (3) defused prosecution evidence of "concealment" with an explanation of the attorney's duty to preserve client confidences. Expert testimony is increasingly significant in criminal cases—it can determine the outcome. This Court should hold that the accused's right to present expert testimony stands on the same constitutional footing as the right to present fact witnesses.

This petition also presents the Court with the opportunity to state definitively the due process standard governing jury instruction on permissive inferences. The constitutional standing of *mandatory* inferences (whether conclusive or rebuttable) has been settled by *Sandstrom v. Montana*, 442 U.S. 510 (1979), and *Francis v. Franklin*, 471 U.S. 307 (1985). However, for a *permissive* inference, the Court has not fixed the degree of logical connection between the proven fact and the presumed conclusion that must be shown in order for jury instruction on that inference

to be constitutional. Here, the trial court charged the jury that petitioner's nondisclosure of client confidences was a "cover-up or concealment" raising a "permissive inference" that he was guilty of the crimes charged. That instruction would fail under the constitutional standard for which we contend because the presumed conclusion was not, on the evidence before the jury, "more probable than not."

At the time of the events of this case, petitioner was an attorney duly admitted to practice within the Commonwealth of Pennsylvania. The charges against him arose from his representation of the three co-administrators of the Estate of Stephen Booras, deceased, during the first two weeks of June 1981. Specifically, petitioner was convicted of: (1) conspiring with one of the co-administrators, John Booras, to misappropriate substantial amounts of cash and jewelry belonging to the estate; (2) theft of that property; and (3) aiding Booras in consummation of the theft.

The other two co-administrators, Chryais Fiammetta and Henry Booras, each misappropriated amounts of cash entrusted to them, $60,000 and $5,500 respectively (R2168a, 2183a, 388a-393a; 524a). On behalf of the Commonwealth, they testified that during meetings at petitioner's office on June 4, 5 and 8, petitioner counseled the three co-administrators to divide among themselves $256,500 of the estate's cash and approximately $23,000 of its jewelry and to hide their defalcations from the decedent's long-lost heir, Theodore Booras, if he should appear (R223a-255a). They also testified that petitioner took an additional $10,000 for himself and set aside a small amount "to show for the estate."

The Commonwealth also relied upon proof that the "Petition for Grant of Letters of Administration" prepared by petitioner, signed by the co-administrators, and filed with Philadelphia's Register of Wills stated the estate's personal, *i.e.*, non-real estate,

assets at $50,000 even though over $250,000 in cash belonging to the estate was on hand (R1503a-1504a).

In addition to that evidence, the Commonwealth presented the testimony of John Terrill, a lawyer who had been retained by Theodore Booras after he surfaced. Terrill testified that on June 9 he contacted petitioner and advised him of his retention and of his client's interest in the estate. He also met with petitioner on June 12 to discuss his client's claim. Terrill testified that on both occasions petitioner enumerated various estate assets, but did not divulge his clients' division of cash and jewelry on June 4 and June 8 (R965a-969a, 973a-977a).

Petitioner testified that he never conspired to divert assets from the estate, that he had explained to the co-administrators their fiduciary responsibilities, and that the division of assets into the administrators' custody on June 4 and 8 occurred at their (principally Fiammetta's) insistence and was a lawful, albeit unorthodox, step for them to take. Petitioner testified that he received the $10,000 as a retainer against his fee for representing the administrators (R1236a-1238a). He also testified that understatement of an estate's personalty is usual and customary among estate practitioners because a Register of Wills' fee is paid on the amount stated and there is no refund if assets taken into account on the petition prove not to belong to the estate; the definitive statement of assets, the inventory, is not filed until 90 days after the administrators' appointment (R1604a-1606a).

With respect to his conversation with Terrill, petitioner testified that, because Fiammetta had taken the position that the real Theodore Booras was dead, he "didn't feel free to discuss anything with [Terrill] that I felt my clients would consider confidential in nature" (R1301a-1302a). Thus, he enumerated for Terrill various assets whose ownership by the decedent was a matter of public record, *e.g.*, a Mercedes automobile and some real estate

in Margate, New Jersey, or the existence of which would not be considered confidential by his clients, *e.g.*, a quantity of coins and jewelry stored in a safe deposit box at Provident National Bank. Regarding the cash and jewelry in the custody of the administrators, petitioner testified:

> At that point it was my feeling that my client would have objected to it and as an attorney I owe my clients a duty of confidentiality until such time as there is a legal requirement for me to produce this information. I envisioned in this particular case that when the Register's hearing [on Theodore Booras' petition to revoke the letter of administration granted to the existing administrators] was scheduled, if in fact they represented Teddy Booras, he would qualify, my clients would be withdrawn as administrators, then Teddy Booras would qualify as administrator and at that point we would owe him an obligation to account to him for all the assets of the estate.

(R1301a-1302a). Petitioner also testified that he never represented to Terrill that he had enumerated all of the estate assets (R1580a).

Petitioner's account of his representation of the co-administrators was corroborated by co-defendant John Booras, who also took the stand.

The defense also proffered the testimony of George Nofer, Esquire, the Chairman of the Estates Department of Schnader, Harrison, Segal & Lewis and, among many other professional distinctions, a former Co-Chairman of the Committee on Specialization of the American Bar Association's Section on Real Property, Probate and Trust Law. Mr. Nofer, an experienced estate practitioner, would have testified that $10,000, the only

amount received by petitioner, was a customary fee for representing the administrators of an estate of this size and that estate practitioners customarily understate assets in a petition for grant of letters. Mr. Nofer would also have described the attorney's duty to preserve client confidences as it operates in the context of estate administration (R2061a-2071a). Petitioner's successive written offers of proof are reprinted as Appendices G and H.

The expert testimony was proffered by petitioner because it answered the otherwise damaging evidence put forward by the Commonwealth. Authoritative proof that the $10,000 petitioner received was consonant with a customary fee would have dispelled any impression among the jurors that it was irregular for him to receive such a large sum. More importantly, such proof would negate any motive to counsel his clients to steal the estate's assets; handling the estate honestly would yield the same amount of money. Expert testimony that understatement of the estate's assets on the petition for grant of letters is customary would also tend to weaken, if not erase, the prosecution's contention that the understatement showed an intention to conceal and misappropriate assets. Finally, testimony explaining the obligation to preserve client confidences was offered to negate the prosecution's heavily emphasized argument that petitioner's nondisclosure to Terrill was a "cover-up." However, the trial court refused to permit Mr. Nofer to take the stand (R1806a).

Regarding Terrill's testimony, the trial court instructed the jury that this evidence of "cover-up or concealment" raised a "permissible inference" of guilt (R1966a-1977a). The charge on this point is reprinted as Appendix J. The court also instructed the jury that it could treat this testimony as establishing the deception element of the theft by deception charges (R1990a-1991a). The charge on this point is reprinted as Appendix K.

The trial court refused to give either of two instructions regarding confidentiality that were proposed by the defense. The first detailed for the jury how the confidentiality obligation bore on petitioner's discussions with Terrill; it is reprinted as Appendix I. The second simply stated: "A lawyer has the duty to preserve the confidences of his clients" (R2026a, 2123a, 2129a). Both were refused. *Id.*

Each of the questions presented was preserved for this Court's review by exception at the trial level (R1806a, 2026a, 2123a, 2129a) and renewed before the Superior Court (Appendix C) and in the Petition for Allowance of Appeal to the Pennsylvania Supreme Court (pp. 21, 27).

REASONS FOR GRANTING THE WRIT

I.

AN ACCUSED'S RIGHT TO PRESENT AN EXPERT WITNESS STANDS ON THE SAME CONSTITUTIONAL FOOTING AS HIS RIGHT TO PRESENT A FACT WITNESS.

This Court has long recognized the constitutional right of an accused to present witnesses on his behalf. The right applies in the federal courts and, as well, in the state courts by operation of either the Compulsory Process Clause of the Sixth Amendment or the Due Process Clause of the Fourteenth Amendment. *Crane v. Kentucky*, 106 S. Ct. 2142, 2146-47 (1986). However, this Court's decisions treating with the right to present witnesses have not held that the presentation of expert testimony is comprehended within that right. Indeed, as is shown below, some of those decisions suggest—but only suggest—that the right to present expert testimony is of a lesser constitutional stature.

The Court should grant certiorari in order to establish

definitively that an accused's right to present reliable, material and relevant expert testimony stands on the same constitutional footing as his right to present fact witnesses.

In *Washington v. Texas*, 388 U.S. 14, 19 (1967), the Court held that an accused's "right to present his own witnesses to establish a defense" is "a fundamental element of due process of law." The Court observed that "the right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense" and applied the Due Process Clause to invalidate a state court conviction obtained in derogation of that fundamental right. *Id.*

The Court's subsequent decisions on this subject have consistently reaffirmed the primacy of this constitutional guarantee. In *Jenkins v. McKeithen*, 395 U.S. 411 (1969), involving the procedures of the Civil Rights Commission, the Court stated:

> The right to present evidence is, of course, essential to the fair hearing required by the Due Process Clause. And, as we have noted above, this right becomes particularly fundamental when the proceeding allegedly results in a finding that a particular individual was guilty of a crime.

395 U.S. at 429.[1] In service of that proposition, the Court held that "a person's right to present his case should not be left to the unfettered discretion of the Commission." *Id.*

In the *Crane* case last year, the Court affirmed the defendant's constitutional right to present the testimony of witnesses who had observed his interrogation and confession to a homicide:

---

1 *See also, Chambers v. Mississippi*, 410 U.S. 284, 302 (1973) ("Few rights are more fundamental than that of an accused to present witnesses in his own defense").

> Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the constitution guarantees criminal defendants a meaningful opportunity to present a complete defense. We break no new ground in observing that an essential component of procedural fairness is an opportunity to be heard. That opportunity would be an empty one if the State were permitted to exclude competent, reliable evidence bearing on the credibility of a confession when such evidence is essential to the defendant's claim of innocence.

Crane v. Kentucky, supra, 106 S.Ct. at 2146-47.[2]

All of those cases involved appellate review of state court exclusions of fact witnesses. However, without explicitly addressing the constitutional standing of the defendant's right to present expert witnesses, the Court has suggested that it is weaker or, perhaps, even non-existent.

In *Washington v. Texas, supra*, 388 U.S. 14, the Court found a denial of the defendant's Compulsory Process right (as incorporated by the Due Process Clause of the Fourteenth Amendment). Ruling that Washington's right to present witnesses was infringed when "the State arbitrarily denied him the right to put on the stand a witness who was physically and mentally capable of testifying *to events that he had personally observed*, and whose testimony would have been relevant and material to

---

2. The Court's subsequent opinion in *Pennsylvania v. Ritchie*, 107 S. Ct. 989, 1001 (1987), suggests that a case such as this one—where the defendant is not aggrieved by a refusal of *governmental assistance* in obtaining evidence—should be analyzed under the Due Process Clause rather than the Compulsory Process Clause.

the defense," the Court implied that expert testimony is not equally available. 388 U.S. at 23 (emphasis added). Similarly, in its opinion in *Crane*, involving the right to present eyewitness testimony bearing on the credibility of a confession, the Court held that "exclusion of *this kind of exculpatory evidence* deprives a defendant of the basic right to have the prosecutor's case encounter and 'survive the crucible of meaningful adversarial testing.' " 106 S. Ct. at 2146-47 (emphasis added).

The Court's only decision touching upon the preclusion of expert testimony as an infringement on the accused's right to present witnesses is *Hamling v. United States*, 418 U.S. 87, *reh. denied*, 419 U.S. 885 (1974), an obscenity case. There, the Court upheld the exclusion of an expert witness offered by the defense on the subject of community standards. The Court stated: "[T]he District Court has wide discretion in its determination to admit and exclude evidence, and this is particularly true in the case of expert testimony." 418 U.S. at 108. A trial court always has the discretion to preclude or limit the presentation of defense witnesses—subject to the preservation of paramount constiutional rights. The statement that the court has greater leeway to exclude expert witnesses implies a lesser, or even non-existent, constitutional right to present this kind of evidence.

There can be no sound basis for the *a priori* limitation of the accused's constitutional right to include only eyewitness or similar factual testimony. In a given case, the exculpatory power of a fingerprint or a voiceprint (with expert interpretation) can equal or exceed the impact of testimony from one who "personally observed" a particular event. Likewise, in *Ake v. Oklahoma*, 470 U.S. 68, 80 (1985), involving an insanity defense, the Court recognized that "the assistance of a psychiatrist may well be crucial to the defendant's ability to marshall a defense" and held that the state must provide such assistance to an indigent accused.

The technological advances and increasing complexity that have characterized our society at large have also manifested themselves in the criminal justice system. Advances in the forensic sciences have made more things reliably provable by experts. Also, more endeavors, *e.g.*, securities registration and trading, taxation, and the practice of law, have achieved a degree of sophistication and complexity such that a jury in a criminal case arising out of those endeavors would be immeasurably assisted in the search for truth by expert testimony.[3] As this Court recognized in *Ake*: "Modern civilization, with its complexities of business, science and the professions, has made expert and opinion evidence a necessity. This is true where the subject matters are beyond the general knowledge of the average juror." 470 U.S. at 82, n.8, *quoting from* 2 I. Goldstein & F. Lane, Goldstein Trial Techniques § 14.01 (2nd ed. 1969).

This Court's omission to secure the constitutional status of the right to present expert testimony, and its implicit minimization of that right, have put in question an entire category of trial evidence, potentially as probative as any other, and have encouraged the perception that such testimony can be excluded or limited by a trial judge exercising the "unfettered discretion" rightly condemned in *Jenkins, supra*, 395 U.S. at 429.

---

3 *See e.g., United States v. Jensen*, 608 F. 2d 1349, 1356 (10th Cir. 1979) (approving admission of expert testimony "with respect to a self-governing rule of a private association," the National Association of Securities Dealers); *United States v. Garber*, 607 F. 2d 92, 97 (5th Cir. 1979) (finding reversible error in a tax fraud conviction where the trial court refused to admit expert testimony regarding taxability of income); *Marx & Co. Inc. v. Diner's Club Inc.*, 550 F. 2d 505, 508-09 (2nd Cir. 1977) (approving expert testimony by a lawyer explaining "the step by step practices ordinarily followed by lawyers and corporations in shepherding a registration statement through the S.E.C." and other testimony concerning the practices of lawyers and others engaged in the securities business"); *Kulak v. Nationwide Mutual Insurance Co.*, 40 N.Y. 2d 140, 148, 351 N.E. 2d 735, 739 (1976) (expert testimony describing the process by which insurance carriers and their attorneys evaluate the settlement values of personal injury claims).

Thus, in the case below, the trial judge excluded expert testimony that was highly probative on the key trial issues of motive, concealment, and intent to deceive, among others. In his opinion, the trial judge invoked his "sound discretion" to exclude expert testimony, noting that he could be reversed only for an abuse of that discretion, and cited reasons that would never suffice to defeat a constitutional right (Appendix B). Indeed, during argument of post-verdict motions, the trial judge stated that his decision to exclude Mr. Nofer's testimony was based on his "gut feeling" for which he "lacked any real authority" [N.T. 47 (4/16/84)].[4]

The Court should accept review of this case as a vehicle to declare that the right to present reliable, material and relevant expert testimony stands on the same constitutional footing as the right to call fact witnesses.

II.

DUE PROCESS BARS JURY INSTRUCTION ON A PERMISSIVE INFERENCE UNLESS IT IS MORE LIKELY THAN NOT.

The trial court charged the jury that petitioner's nondisclosure to Terrill of the June 4 and June 8 proceedings in his office was a "cover-up or concealment" giving rise to a "permissible inference" of guilt (Appendix J). The court steadfastly refused petitioner's repeated requests for instruction on the attorney's duty

---

4. During the trial, the court accepted the prosecutor's argument that expert testimony would be "cumulative" to petitioner's own testimony (R1641a, 1737a, 1806a). The trial opinion is to the same effect: "Defendant Costigan himself, a former Register of Wills and an attorney specializing in estate law, was given wide latitude and testified extensively to the norm of estate practice, . . ." (Appendix B). However, the court also instructed the jurors that, in assessing petitioner's credibility, they should bear in mind that petitioner was "an interested witness and vitally concerned with the outcome" (R1958a).

to preserve client confidences (R2026, 2042, 2123, 2129). Petitioner's nondisclosure was no more probative of guilt (cover-up of a theft) than innocence (preservation of client confidences). The proven fact, petitioner's nondisclosure, did not make the suggested conclusion, that he was guilty of eight felonies, more probable than not.

The Court should accept review of this case and hold that due process bars instructing a criminal jury on a permissible inference unless, in light of the facts before that jury, the inference is demonstrably more probable than not.

Attorneys practicing in the Commonwealth of Pennsylvania, like their counterparts in every other jurisdiction, are ethically obligated to preserve the confidences of their clients. Code of Professional Responsibility, Disciplinary Rule 4-1, Ethical Canon 4, and Ethical Consideration 4-1 and 4-2. That obligation is a "sacred trust." *Slater v. Rimar, Inc.*, 462 Pa. 138, 148, 338 A. 2d, 584, 589 (1975). The *Slater* court held: "There is no doubt that under both the Code of Professional Responsibility and its predecessor, the Canons of Professional Ethics, *which have the force of statutory rules of conduct for lawyers*, it is the duty of a lawyer to preserve the confidences of his client. 462 Pa. at 145, 338 A. 2d at 587 (emphasis added).[5]

If allowed to stand, the decision below will broadcast an ominous signal to a profession already embattled by those who would weaken its commitment to confidentiality.[6] No lawyer can

---

5. *See also, Brennan v. Brennan*, 281 Pa. Super. 362, 370, 422 A. 2d 510, 514 (1980): "Both the fiduciary relationship existing between lawyer and client and the proper functioning of the legal system require the preservation by the lawyer of the confidences and secrets of one who has employed or sought to employ him."

6. *See generally*, Lynch, *The Lawyer as Informer*, 1986 Duke L.J. 491 (Cont'd)

always know that his clients are conducting themselves lawfully; yet his innocent adherence to the confidentiality obligation can make him presumptively complicit in a client's crime. That is the force and direction of the prosecutor's evidence of nondisclosure and the trial court's instruction. In the context of an attorney's nondisclosure of his client's affairs, the "cover-up or concealment" instruction is logically insupportable and, for that, constitutionally deficient.

In *Ulster County Court v. Allen*, 442 U.S. 140 (1979), the Court divided sharply (5-4) on the constitutionality of an instruction that the presence of guns in an automobile is presumptive evidence of possession by all occupants. The trial court's instruction on this "permissive presumption" was attacked as a denial of due process because it invited the jury to find possession from proof of something less than that, *i.e.*, coincidental presence in the automobile of guns and people—thus lightening the state's burden of proving possession beyond a reasonable doubt. The majority approved the instruction on the inference, holding that such instruction unfairly "affects the application of the 'beyond a reasonable doubt' standard only if, under the facts of the case, there is *no rational way* the trier [of fact] could make the connection permitted by the inference." 442 U.S. at 157 (emphasis added).

The dissenting opinion declined to limit the "constitutional difficulty" of permissive presumptions to their impact on the burden of proof, urging instead a broader rule that a permissive presumption is "unconstitutional, unless it can be said with substantial assurance that the presumed fact is *more likely than not* to flow from the proved fact on which it is made to depend." 442 U.S. at 171, *quoting from Leary v. United States*, 395 U.S. 6, 36 (1969) (emphasis added).

(Cont'd)
(1986); Kuhn, *Disclosure v. Confidentiality*, 29 Cath. L. 356 (Aut. 1985); and *Preserving the Client's Confidences—The Lawyer's Dilemma*, 59 Fl. B.J. 13 (June 1985).

More recently, the Court reviewed the constitutionality of jury instructions on *mandatory* presumptions, which were attacked on grounds that they relieve the prosecution of its burden of persuasion with respect to each element of the crime charged. The Court held it is a denial of due process to instruct a homicide jury that "a person intends the ordinary consequences of his voluntary acts" because the intent element is thereby presumed from proof of the defendant's acts. *Sandstrom v. Montana*, 442 U.S. 510 (1979) (conclusive presumption); *Francis v. Franklin*, 471 U.S. 307 (1985) (rebuttable presumption). Although those cases did not involve permissive inferences, the Court in *Francis* stated:

> A permissive inference does not relieve the State of its burden of persuasion because it still requires the State to convince the jury that the suggested conclusion should be inferred based on the predicate facts proven . . . .A permissive inference violates the Due Process Clause if the suggested conclusion is not one that reason and common sense *justify* in light of the proven facts before the jury.

471 U.S. at 314-15 (emphasis added). Having no need to do so in that mandatory presumption case, the Court did not elaborate on what strength of logical connection is necesssry to "justify" the suggested conclusion.

Petitioner submits that this case is the appropriate vehicle for a definitive articulation of the constitutional standard governing permissible inferences.[7]

---

7. If the Court is not disposed to take the case for this purpose, then petitioner respectfully requests a grant of certiorari and summary reversal on grounds that the refusal to instruct on confidentiality, in conjunction with the "cover-up or concealment" instruction, so unfairly "stacked the deck" against petitioner that he was deprived of due process. *Hickory v. United States*, 160 U.S. 408, 421 (1896) (reversing where trial court's instruction "magnified and distorted the proving power of the facts on the subject of the concealment [of crime charged]").

CONCLUSION

For the foregoing reasons, petitioner respectfully prays that the Court issue writ of certiorari to review the judgment of the Superior Court of Pennsylvania.

Dated: May 8, 1987

Respectfully submitted,

WILLIAM F. COSTIGAN
Attorney for Petitioner

APPENDIX A—VARIOUS CRIMINAL INFORMATIONS AND FINAL JUDGMENTS OF SENTENCE OF HONORABLE ANGELO A. GUARINO DATED JULY 26, 1984

COMMONWEALTH VS.

NAME, A/K/A, ADDRESS, ZIP CODE:
ROBERT COSTIGAN, 9755 Verree Rd., Phila., Pa.

YEAR, TERM & NO.: 04908 MAR 1987

POLICE PHOTO NO.: 596301

THIS CASE INVOLVES NOS. 4900 TO 4915

STATUS OF DEFENDANT: Bail Set $00001 ROR Nominal

PLACE OF PRELIM. HEARING: Rm. 675 City Hall

ISSUING AUTH.: Silberstein

DT. OF INCIDENT: 12/28/81 BIRTH DATE: 7/29/31

SEX: M RACE: C D.C. NO.: 817102921

M.C. CASE NO.: 8112 2434 COMPLAINT DT.: 12/28/81

DT. PREL. HEARING: 3/23/82 DATE: 4/2/82

DATE OF ARRAIGN.: 4/06/82

CHARGE CODES & CHARGES: 50002 - THEFT BY UNLAWFUL TAKING OR DISPOSITION 3921

12-4-82—Jury returns with a Verdict of Guilty. Sentence deferred.

Appendix A

DATE: June 18, 1984

Motion for new trial denied. Defendant sentenced to not less than two (2) years nor more than five (5) years in the S.C.I. Defendant to pay $5,000.00 fine. Sentence stayed pending appeal. Same bail to stand.

DATE: 7-11-84

Petition to Vacate Sentence is Granted.

s/ A. Guarino, J

DATE: 7-25-84

Petition for reconsideration of sentence is denied. Sentence imposed on 6-18-84 is hereby stayed pending appeal.

s/ A. Guarino, J.

Appendix A

* * *

[SAME AS ABOVE]

* * *

YEAR, TERM & NO.: 04909 MAR 1987

CHARGE CODES & CHARGES: 56002 - THEFT BY DECEPTION 3922

12-4-82—Jury returns with a Verdict of Guilty. Sentence deferred.

DATE: June 18, 1984

Merges with Theft, Unl. Tak/Disp. for sentencing purposes.

s/ A. Guarino, J.

Appendix A

* * *

[SAME AS ABOVE]

* * *

YEAR, TERM & NO.: 04910 MAR 1987

CHARGE CODES & CHARGES: 56002 - THEFT BY DECEPTION 3922

12-4-82—Jury returns with a Verdict of Guilty. Sentence deferred.

DATE: June 18, 1984

Merges with Theft, Unl. Tak/Disp. for sentencing purposes.

s/ A. Guarino, J.

Appendix A

* * *

[SAME AS ABOVE]

* * *

YEAR, TERM & NO.: 04911 MAR 1987

CHARGE CODES & CHARGES: 55750 - THEFT BY FAILURE TO MAKE REQUIRED DISPOSITION OF FUNDS RECEIVED 3927

12-4-82—Jury returns with a Verdict of Guilty. Sentence deferred.

DATE: June 18, 1984

Merges for sentencing purposes with Theft, Unl. Tak/Disp.

s/ A. Guarino, J.

Appendix A

* * *

[SAME AS ABOVE]

* * *

YEAR, TERM & NO.: 04912 MAR 1987

CHARGE CODES & CHARGES: 55750 - THEFT BY FAILURE TO MAKE REQUIRED DISPOSITION OF FUNDS RECEIVED 3927

12-4-82—Jury returns with a Verdict of Guilty. Sentence deferred.

DATE: June 18, 1984

Merges for sentencing purposes with Theft, Unl. Tak/Disp.

s/ A. Guarino, J.

Appendix A

* * *

[SAME AS ABOVE]

* * *

YEAR, TERM & NO.: 04913 MAR 1987

CHARGE CODES & CHARGES: 50002 - THEFT BY UNLAWFUL TAKING OR DISPOSITION 3921

12-4-82—Jury returns with a Verdict of Guilty. Sentence deferred.

DATE: June 18, 1984

Not less than two (2) years nor more than five (5) years in the S.C.I. concurrent with 8203-4908. Sentence stayed pending appeal.

s/ A. Guarino, J.

DATE 7-25-84

Petition for Reconsideration of sentence is denied. Imposition of sentence is hereby stayed pending appeal.

s/ A. Guarino

Appendix A

* * *

[SAME AS ABOVE]

* * *

YEAR, TERM & NO.: 04914 MAR 1987

CHARGE CODES & CHARGES: 04152 - AIDING CONSUMMATION OF CRIME 5107 M2

12-4-82—Jury returns with a Verdict of Guilty. Sentence deferred.

DATE: June 18, 1984

Not less than one (1) year nor more than two (2) years in the S.C.I. to run concurrent with 8203-49\8. Sentence stayed pending appeal.

s/ A. Guarino, J.

DATE: 7-26-84

Petition for Reconsideration of sentence is hereby denied. Imposition of sentence is stayed pending appeal.

s/ A. Guarino, J.

Appendix A

* * *

[SAME AS ABOVE]

* * *

YEAR, TERM & NO.: 04915 MAR 1987

CHARGE CODES & CHARGES: 94001 - CRIMINAL CONSPIRACY 903

12-4-82—Jury returns with a Verdict of Guilty. Sentence deferred.

DATE: June 18, 1984

Not less than two (2) years nor more than five (5) years in the S.C.I. to run concurrent with 8203-4908. Sentence stayed pending appeal.

s/ A. Guarino, J.

DATE: 7-26-84

Petition for Reconsideration of Sentence is denied. Imposition of sentence is hereby stayed pending appeal.

s/ A. Guarino, J.

APPENDIX B—OPINION OF HONORABLE ANGELO GUARINO DATED JANUARY 25, 1985

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CRIMINAL TRIAL DIVISION

MARCH TERM, 1982

BILL NOS. 4900-4907

COMMONWEALTH

V.

JOHN BOORAS, JR.

MARCH TERM, 1982

BILL NOS. 4908-4915

COMMONWEALTH

V.

ROBERT COSTIGAN

OPINION OF TRIAL COURT

GUARINO, J. January 25, 1985

Following a three week jury trial before the undersigned, defendants Robert Costigan and John Booras were convicted of conspiracy and two counts each of theft by unlawful taking, theft by deception and theft by failure to make proper disposition.

Appendix B

Defendant Costigan was also convicted of aiding consummation of a crime and defendant Booras of unlawful entry into a safe deposit box. Post-trial motions were filed, argued and denied, after which, defendants were sentenced. They have taken the instant appeals. Of the more than hundred issues raised in defendants' post-trial motions, we address only those set forth hereinafter, which have been briefed or argued and are thereby preserved for review. *Commonwealth v. Manigault*, 501 Pa. 506, 462 A.2d 239 (1983); *Commonwealth v. Holzer*, 480 Pa. 93, 389 A.2d 101 (1978); *Commonwealth v. Balch*, ____ Pa. Super. ____, 476 A.2d 458 (1984).

I.

The Facts

The issues arise from the following factual background. On May 27, 1981, Steven Booras was murdered.[1] He died intestate, survived by a son, Teddy (who, after his parents divorced fourteen years earlier, had gone to live with his mother) and three siblings: Chryais Fiammetta, defendant John Booras and Henry Booras. The next day, Fiammetta, defendant Booras and two other relatives went to the decedent's Philadelphia residence, where they discovered caches of large sums of money and jewelry,[2] which defendant Booras removed. Defendant Booras also went to two safe deposit boxes rented by the decedent in both their names; he was refused access to the one but succeeded in removing

1. The decedent was the reputed head of the so-called "Greek Mafia".

2. A veritable treasure trove, the finds included a broiler pan filled with six to nine stacks of currency, each banded in a bank wrapper indicating the sum of $30,000.00, a plastic colander filled to the brim with assorted pieces of jewelry, and a wad of loose currency totaling $4,000.00.

money from the other.[3] After a four hour search of the decedent's residence the following day, he found and removed additional valuables.[4] That same day, May 29th, Fiammetta learned that Teddy had telephoned the funeral director; she passed on the information to defendant Booras and later to defendant Costigan, the attorney who had been retained by defendant Booras to handle the estate.

On June 3rd, upset by defendant Booras' declaration that he was going to keep all the money, jewelry and other goods (N.T. 1.153),[5] Fiammetta complained to the F.B.I. and defendant Costigan, who promised to talk to defendant Booras, admonishing that "(w)hatever you do, don't call the F.B.I. or the I.R.S." (N.T. 1.157). Defendant Costigan contacted defendant Booras, suggesting that the money and jewelry be brought to him to be "split . . . up. . . (t)o try to keep her (Fiammetta) cool" and advising him to keep this quiet and to meet with Costigan privately. (N.T. 6.152).

On June 4th, the three siblings met with defendant Costigan at his office. Defendant Booras brought a flight bag filled with currency. After a trip to the Register of Wills Office, where the siblings were sworn as administrators of the decedent's estate, they examined the flight bag. Fiammetta immediately complained that all of the money that had been discovered at the decedent's

---

3. He removed $75,000.00 in cash, leaving a nominal sum of $5,000.00.

4. These valuables consisted of fifteen to twenty packets of $50 and $100 bills, each an inch thick; five to six packages of loose cash; a few pieces of jewelry; a collection of gold and silver coins; and a stamp collection.

5. Defendant Booras had also taken the decedent's Mercedes, ten carat diamond ring, and black diamond ring.

home was not there, calling her son-in-law (who had been present during the search and accompanied her to the meeting) into the meeting room to confirm it. Ignoring her remonstrance, defendant Costigan proceeded to count and divide the currency. First, he earmarked $10,000.00 as his "fee", remarking that such was "not bad for a few hours work". (N.T. 1.169, 183). Next, he put aside $30,000.00 for the estate, characterizing it as a "bone" to be thrown Teddy were he to appear. (N.T. 1.162; 3.206). The remainder was divided into three piles; each sibling was given approximately $80,000.00 and instructed to keep the arrangement secret, for if Teddy showed up, he would get everything and they nothing. (N.T. 1.168-169).

On June 5th, defendant Booras delivered two suitcases containing jewelry and other valuables to defendant Costigan's office. On June 8th, after the pieces had been appraised, the jewelry was divided: a small portion was set aside for the estate, the remaining pieces were divided equally among the three siblings, and defendant Costigan repeated his admonition that the transaction remain secret, for if Teddy showed up, everything would go to him. (N.T. 1.194; 3.214, 217).

It was soon after this that Fiammetta turned over the jewelry and unspent portion of her share of the money to Ronald Kidd (a lawyer who had previously represented her deceased brother), reporting the crimes to him, the District Attorney, and again to the F.B.I. She also contacted her brother Henry, who in turn delivered his share of the assets to Kidd.

On June 9th and again on June 12th, when John Terrill, the attorney representing Teddy, telephoned to inquire about the estate, defendant Costigan, in detailing its assets, neglected to include the money and jewelry distributed among the siblings.

Appendix B

At a June 25th meeting, upon being confronted with Terrill's knowledge of the distribution,[6] defendant Costigan became visibly uneasy, blathering that the money had come from a safe deposit box held jointly by the decedent and defendant Booras. He turned over to Terrill the $10,000.00 (which he had stashed in a desk drawer) and a ten carat diamond ring, and arranged for Terrill to accompany him to the bank where the other assets had been placed in a safe deposit box in his name.

Both defendants testified, portraying Fiammetta as the antagonist/villain—a greedy, hysterical, jealous barracuda with a long-standing grudge against defendant Booras stemming from the distribution of their mother's estate six years earlier. Defendants denied any wrongdoing, testifying that they had wanted to put the assets in a bank; that the distribution had been compelled by the dissent of Fiammetta, who, insisting that Teddy was dead and that the telephone call to the funeral parlor was a hoax, had demanded her share then and there; and that in making the distribution, defendant Costigan had advised that the assets should be preserved because if Teddy showed up, the siblings would be required to account to him.

Defendant Costigan explained, painstakingly if unconvincingly, that he had not entered the $10,000.00 "fee" in his ledger and had kept the cash in his desk drawer for three weeks because he had anticipated that due to the conflicts between his clients, he would be removed from the case. His failure to divulge the distribution among the siblings to Terrill was explained on the basis of attorney-client confidentiality and that he had no obligation to account to an attorney professing to represent

---

6. Terrill had learned of the distribution through Kidd; the two were members of the same law firm.

the heir. The understatement of the value of the estate in the application for letters of administration was explained as being the customary practice. He acknowledged that his handling of the estate was unorthodox and that his actions might have been misleading, but insisted that his motivations were noble.

Defendant Booras testified that he had intended no wrong, that he had followed the advice of counsel, and that because the decedent had deeded his residence to him in fee, retaining only a life estate therein, he had honestly believed that upon the decedent's death, the house and all its contents belonged to him alone; the decedent had entrusted him with the combinations to the elaborate burglary alarm system protecting the property and the safes it contained. He explained the distribution of "his" money and jewelry by both his bounteous desire to share and his effort to appease Fiammetta, who had threatened to go to the authorities if she did not get half. The money and jewelry later recovered from the residence in a sequestration search ordered by the Orphans' Court, he explained as that which he brought with him when he occupied the premises immediately after the decedent's death; $80,000.00 and all of the jewelry, except for a portion which had been sold, was his share of the distribution made in defendant Costigan's office, and the additional money, approximately $108,000.00, was a personal gift the decedent had made in 1974.

II.

Sufficiency of Evidence

This evidence, when viewed in the light most favorable to the verdict winner, proves beyond a reasonable doubt every element of the crimes of which defendants were convicted. See generally,

Commonwealth v. Tribble, 502 Pa. 619, 467 A.2d 1130 (1983); *Commonwealth v. Davis*, ____ Pa. Super. ____, 479 A.2d 1077 (1984); *Commonwealth v. Carter*, ____ Pa. Super. ____, 478 A.2d 1286 (1984); *Commonwealth v. Ritchie*, ____ Pa. Super. ____, 472 A.2d 220 (1984). Defendants' argument that the evidence is insufficient is that because defendant Booras was an administrator of the estate and held title to the estate assets, the property taken was not the "property of another"; there being no theft, there can be no conspiracy and no aiding consummation of a crime.

The argument is simplistically fallacious, premised on a misunderstanding of what constitutes "property of another" under the Crimes Code. True, to constitute a theft, the property, whether appropriated by unlawful taking, by deception or by failure to make required disposition, must be that of another. 18 Pa. C.S.A. §§ 3921, 3922, 3927. Section 3901 (18 Pa. C.S.A. § 3901) defines "property of another" as:

> . . . property in which any person other than the actor has an interest which the actor is not privileged to infringe, regardless of the fact that the actor also has an interest in the property . . . .

Upon appointment by the Register of Wills, an administrator has the legal title to the personal property of the estate, which he holds in trust for the benefit of the estate, the decedent's creditors and the decedent's heirs, whose equitable rights to the property vest immediately upon the decedent's death. 20 Pa. C.S.A. § 301(a), 3311; *Blank v. Clark*, 79 F. Supp. 373 (E.D. Pa. 1948); *In re Kurkowski's Estate*, 487 Pa. 295, 409 A.2d 357 (1979); *In re Wallis' Estate*, 421 Pa. 104, 218 A.2d 732 (1966); *In re Comerford's Estate*, 388 Pa. 278, 130 A.2d 458 (1957); *Brothers Estates*, 156 Pa. Super. 292, 40 A.2d 156 (1944). A

trustee, guardian or one in a comparable position is guilty of theft if he misappropriates funds or property for a use inconsistent with the purpose for which the items are held. *Commonwealth v. Coward*, ____ Pa. Super. ____, 478 A.2d 1384 (1984); *Commonwealth v. Levi*, 44 Pa. Super. 253 (1910); *Commonwealth v. Kaufman*, 9 Pa. Super. 310 (1899). Defendant Booras' taking of the money and jewelry as his own infringed upon and was inconsistent with the interests of the heir and the estate and thus constituted a theft.

The argument that a personal representative or other fiduciary is not criminally liable until he is required to account is also off the mark. While it is true that defalcations are secretive and generally discovered only upon audit, it does not follow that defendants cannot be liable until the audit. A person is guilty of theft of funds entrusted to him the moment he exercises dominion over the property with the intent of depriving the beneficiary or rightful owner of it permanently. See *Commonwealth v. Stockard*, 489 Pa. 209, 413 A.2d 1088 (1980); *Commonwealth v. Nappi*, 288 Pa. Super. 240, 431 A.2d 1027 (1981); *Commonwealth v. Hoffman*, 263 Pa. Super. 442, 398 A.2d 658, 662-3 (1979).

The cases cited by defendants, *Commonwealth v. Fritz*, 323 Pa. Super. 488, 470 A.2d 1364 (1983) and *Commonwealth v. Crafton*, 240 Pa. Super. 12, 367 A.2d 1092 (1976), like the argument, are not on point. These cases stand for the proposition that mere commingling of funds is insufficient to show felonious intent and theft. Here, the evidence was clear and unmistaken that defendants appropriated the money and jewelry of the estate with the express intent of depriving Teddy, the rightful heir, of the property.

Appendix B

The evidence being sufficient to establish a theft, it also makes out the offenses of conspiracy and aiding consummation of a crime. The argument that a conspiracy was not shown because the evidence was as consistent with lawful activity as it was with unlawful activity is not only irrelevant on a question of sufficiency of the evidence, where the evidence is viewed in the light most favorable to the verdict winner, but contrary to the record which clearly shows activity not at all consonant with lawfulness.

Defendant Costigan's additional argument, that the evidence was insufficient for want of expert testimony concerning the administration of estates, is convoluted and irrelevant to the issue. The line of malpractice cases relied upon, where evidence of the technical practices establishing the standard for an attorney's due care is essential to the cause of action, is inapplicable here, where defendant was charged not with breaching a duty of due care but with committing crimes.

III.

Evidentiary Rulings

1.

Both defendants objected to Terrill's testimony recounting defendant Costigan's failures to account for the money and jewelry distributed to the siblings, defendant Costigan on the ground that the evidence was irrelevant and prejudicial, defendant Booras on the ground that it was hearsay.

That Costigan's utterances were admissible against him as the "admissions of a party" is unquestionable and unquestioned. The statements were also admissible against defendant Booras,

who was a party to the transactions referred to therein. Defendant Costigan's statements to the attorney representing Teddy, disclosing the "bone" that had been set aside for the estate while concealing the distribution to himself and the siblings, were as relevant and probative for what they revealed as to what they failed to reveal. When considered with the other evidence, the statements reflected the criminal quality of the transactions and the "secret(iveness)" with which the parties intended to enshroud their activities, illustrating the parties' mens rea and stripping the transactions of the innocent pretext defendants wanted the jury to believe. Evidence of concealment, flight or false statements is always relevant and admissible, since the jury may infer therefrom that the actions were done with intent to conceal the crime or divert suspicion and hence are indicative of guilt. *Commonwealth v. Madison*, 501 Pa. 485, 462 A.2d 228 (1983); *Commonwealth v. Boyle*, 498 Pa. 486, 447 A.2d 250 (1982); *Commonwealth v. Berrios*, 495 Pa. 444, 434 A.2d 1173 (1981); *Commonwealth v. Cristina*, 481 Pa. 44, 391 A.2d 1307 (1978); *Commonwealth v. Jones*, 250 Pa. Super. 471, 378 A.2d 1245 (1977).

In addition, the evidence was admissible against defendant Booras under the rule exempting the declarations of a co-conspirator made in furtherance of the conspiracy. The assertion that the conspiracy terminated before defendant Costigan made the declarations is untrue; as the parties agreed to keep their actions secret lest they lose the fruits of their nefarious labors defendant Costigan's statements are deemed to have been made in furtherance of the conspiracy. See *Commonwealth v. Dreibelbis*, 493 Pa. 466, 426 A.2d 1111 (1981); *Commonwealth v. Coccioletti*, 493 Pa. 103, 425 A.2d 387 (1981); *Commonwealth v. Basile*, 312 Pa. Super. 206, 458 A.2d 587 (1983); *Commonwealth v. Plusquellic*, 303 Pa. Super. 1, 449 A.2d 47 (1982).

Appendix B

Defendant Costigan's argument that the evidence should have been suppressed on the ground that the Code of Professional Responsibility enjoined him from making any disclosure, is not rational. If indeed there was such a proscription, the referenced declaration made in violation thereof would still be admissible, along with the explanation for the partial disclosure. But, be that as it may, we note that the Code of Professional Responsibility does not vest criminal transactions between lawyers and clients with confidentiality. See, DR 4-101(c); *In re Grand Jury Proceedings*, 604 F.2d 798 (C.A. Pa. 1979); *In re Westinghouse Elec. Corp. Uranium Contracts Litigation*, 76 F.R.D. 47 (D.C. Pa. 1977); *Commonwealth v. Trolene*, 263 Pa. Super. 263, 397 A.2d 1200 (1979).

Equally unavailing is defendant Costigan's claim of prejudice, that he was forced to dispel the inference of criminality by educating the jury on the confidentiality obligation of attorneys. For relevant evidence to be excluded on the ground that its probative value is outweighed by its prejudicial impact, the prejudice must be more than that which naturally flows from relevant and probative evidence, as where the evidence is inherently inflammatory (i.e., evidence of other crimes). See, *Commonwealth v. Rigler*, 488 Pa. 441, 412 A.2d 846 (1980), cert. denied 451 U.S. 1016; *Commonwealth v. Green*, 477 Pa. 170, 383 A.2d 877 (1978); *Commonwealth v. Ulatoski*, 472 Pa. 53, 371 A.2d 186 (1977).

2.

For the same reasons, defendant Booras' testimony in Orphans' Court on June 30, 1981[7] (after the court-ordered

---

7. The Commonwealth read into evidence an extract of defendant Booras' (Cont'd)

sequestration search had unearthed the other assets of the estate) was admissible against defendant Costigan. The assertion that the conspiracy terminated on June 25th when the thefts were exposed and admitted to Terrill is not true; the concealment of defendant Booras' appropriation of the money he failed to bring in to defendant Costigan's office was ongoing.

Nor was the evidence inadmissible because it contravened the Commonwealth's bill of particulars. Although generally, the Commonwealth's evidence is limited by what is stated in its bill of particulars, the purpose of the rule is to avoid surprise on matters the defendant is not prepared to meet. *Commonwealth v. Simione*, 447 Pa. 473, 291 A.2d 764 (1972); *Commonwealth v. Bartman*, 240 Pa. Super. 495, 367 A.2d 1121 (1976). Here, however, the evidence came as no surprise; all the parties had been present and represented at the Orphans' Court proceeding. Moreover, we found no such limitation as claimed; the bill of particulars alleged that the conspiracy began "on or about May 28, 1981" and continued "up to and including June 30, 1981", the date of the Orphans' Court hearing. (Commonwealth's Answer To Defendant's Request For Bill Of Particulars, ¶¶ 23, 26).[8]

It is also worthy of note that defendant Booras testified at trial in the exact same vein without the slightest objection

---

(Cont'd)
full testimony, which had been previously marked and incorporated as evidence in the case (N.T. 11/12/82, pp. 69-70); the extract recounted the activities that had occurred in defendant Costigan's office and contained defendant Booras' assertion that he had brought all of the money found in the decedent's residence to the meeting in defendant Costigan's office. (N.T. 6.139-156).

8. Although the Quarter Sessions file does not contain the original filing or indicate that such was ever made, the Commonwealth concedes that a bill of particulars was filed and has provided this Court with a copy thereof; we have taken the liberty of placing it in the file.

from defendant Costigan. Therefore, the claim of error on this point, which is based on confrontation grounds, is fatuous as well as unavailing. See *Nelson v. O'Neil*, 402 U.S. 622, 91 S.Ct. 1723, 29 L.Ed 2d 227 (1971); *Commonwealth v. Evans*, 489 Pa. 85, 413 A.2d 1025 (1980); *Commonwealth v. Norman*, 272 Pa. Super. 300, 415 A.2d 898 (1979); *Commonwealth v. Harvey*, 263 Pa. Super. 121, 397 A.2d 430 (1979); *Commonwealth v. Weitkamp*, 255 Pa. Super. 305, 386 A.2d 1014 (1978).

3.

Next, defendant Costigan vies for error in the Court's refusal to allow his expert to testify to the procedures followed by lawyers in the administration of estates.

The proffer was that George Nofer, Esquire would testify to: (1) the practical necessity of conducting an administration expeditiously; (2) the disadvantages of out-of-state or multiple administrators; (3) the manner of preparing a petition for letters of administration and the undervaluation of estate assets therein; (4) the basis for computing an estate attorney's fee; (5) when "disposition" of estate assets is required; (6) that administrators have title to estate personalty and may maintain individual custody or make a fair value purchase thereof (so-called "risk distribution"); and (7) the confidentiality obligation of an estate attorney where the decedent is reputedly wealthy and dies a highly publicized death.[9] The Court ruled that the expert would be permitted to testify only to the practice and procedure customarily used by attorneys in administering estates. (N.T. 11.196-200;

---

9. Although the original and revised offers of proof included two additional areas, defendant has briefed and argued the issue only with respect to the areas enumerated.

12.39-45). Complaining that the ruling was too restrictive and would render the witness ineffective, defendant determined not to call him. (N.T. 12.45).

The admission of expert testimony is a matter within the sound discretion of the trial court, whose determination is irreversible absent a clear abuse of discretion. *Commonwealth v. Colon*, 264 Pa. Super. 314, 399 A.2d 1068 (1979); *Commonwealth v. Snyder*, 254 Pa. Super. 186, 385 A.2d 588 (1978); *Commonwealth v. Nasuti*, 180 Pa. Super. 279, 119 A.2d 642 (1956), aff'd 385 Pa. 436, 123 A.2d 435; see, *Idzojtic v. Pennsylvania R. Co.*, 456 F.2d 1228 (3rd Cir. 1972). Generally, only a witness who has personal knowledge of a relevant fact is permitted to testify; an expert may testify only where the evidence relates to a science, art, skill or occupation so far beyond the ken of common knowledge or experience that the jury needs assistance in evaluating the evidence and its bearing on the issues. *Commonwealth v. Bennett*, 471 Pa. 419, 370 A.2d 373 (1979); *Commonwealth v. O'Searo*, 466 Pa. 224, 352 A.2d 30 (1976); *Commonwealth v. Oates*, 269 Pa. Super. 157, 409 A.2d 112 (1979).

It must be emphasized that defendant was charged not with a deviation from normal estate practices, but with theft, conspiracy and aiding consummation of a crime, and that his criminal intent rested not so much on the manner in which he administered the estate, which he admitted was unorthodox, but on whether he did and made the inculpatory acts and statements attributed to him, which he denied. On this issue, the expert's explanations and opinions would have been not only improper but unnecessary; the vel non of defendant's criminal intent was not such an obstruse topic that the jury could not have determined it without the aid of expert testimony. The implications of a defendant's conduct are within a jury's capabilities and are not a proper subject for

expert testimony. *United States v. Ness*, 665 F.2d 248 (8th Cir. 1981); *United States v. Bronston*, 658 F.2d 920 (2nd Cir. 1981); *United States v. Baskes*, 649 F.2d 471 (7th Cir. 1980); *United States v. Southers*, 583 F.2d 1302 (5th Cir. 1978); *United States v. Sink*, 355 F. Supp. 1067 (E.D. Pa. 1973).

We submit that our ruling was within the ambit of our discretion and in favor of the defendant, whose failure to call the witness was due not so much to the limitations imposed but to the realization that he could not have helped defendant's cause. The Court, no stranger to estate practice, realized that an expert could have only emphasized the admittedly unorthodox manner in which the estate was handled; in the wildest expectations, the expert would not and could not have condoned or chastened the admitted gross deviations, the significance and impact of which under the circumstances of this case, were within the competence of the jury.

The Court's ruling gave defendant all that was asked for in the first three points of the offer of proof: 1) the benefit of diligence in an administration; 2) the disadvantage of a non-resident administrator and multiple administrators; and 3) the reasons for the practice of underestimating the assets in applying for letters of administration. This evidence might have assisted the jury in determining the significance to be accorded the haste with which defendants obtained letters of administration, why defendant Costigan suggested that defendant Booras, a Philadelphia resident, be sole administrator, and why he valued the estate at $50,000.00 in applying for letters of administration when the cash and jewelry alone amounted to seven times that sum.

The other four categories presented in the offer of proof were either not pertinent to any issue in the case or not a proper subject

for expert comment. With respect to whether the $10,000.00 was defendant Costigan's cut for assisting the unlawful activity or his fee for handling the estate, the evidence of the customary fee a lawyer is entitled to for serving an estate was irrelevant.[10] The other points—when an accounting lies, when distribution of assets (defendant termed it "disposition" to conform with the theft statute) is required, who has title and the right to possession, and the confidentiality of the lawyer/client relationship—were matters of law and for the Court, not an expert. *United States v. McCullough*, 427 F. Supp. 246 (D.C. Pa. 1977); *United States v. Sink*, supra; *Commonwealth v. Stockard*, 489 Pa. 209, 413 A.2d 1088 (1980); *Commonwealth v. Evans*, 190 Pa. Super. 179, 154 A.2d 57 (1954), aff'd 399 Pa. 387, 160 A.2d 407, cert. denied 364 U.S. 899; 23 C.J.S. Criminal Law, § 872, p. 443; 7 Wigmore, Evidence, § 1952, p. 103 (Chadbourn rev. 1978); see, *Commonwealth v. Gwaltney*, 479 Pa. 88, 387 A.2d 848 (1978); *Commonwealth v. Bishop*, 472 Pa. 485, 372 A.2d 794 (1977).

To this end, an overview of the procedural and substantive law was included in the Court's charge. (N.T. 14.60-66). Defendant Costigan himself, a former Register of Wills and an attorney specializing in estate law, was given wide latitude and testified extensively to the norm of estate practice, giving, where pertinent, the reasons for his deviations therefrom. (N.T. 7.87-224; 8.3-120; 9.115-141). While the defendant is a witness to his own mental state, another, even an expert, is not; generally, evidence must come from the personal knowledge of the witness as something

---

10. For the same reason, we excluded the testimony of Sylvia Ball, a clerk in the Register of Wills Office, to the effect that in an estate the size of the decedent's, the Inheritance Tax Department would consider $10,000.00 a proper attorney's fee deduction for tax purposes. (N.T. 10.25-34). A fee is something that is charged against the estate at the end of the administration, not taken off the top of the assets at the beginning.

he saw, heard, smelled, touched or tasted, i.e., witnessed. The proffer did not indicate that the expert was offered as a witness to defendant's mental state at the time of the taking.

4.

Defendant Costigan also complains of the exclusion of other evidence: the petition of Frankford Trust Company, the successor administrator, valuing the estate at $100,000.00 (N.T. 12.16-21), and the testimony of a clerk in the Register of Wills Office that estates are undervalued to the tune of 150 cases per month. (N.T. 12.67-72). Contrary to the contention, neither piece of evidence would have proven the custom of the profession to undervalue estates; according to the principle of "inter alios acta", what someone did on one occasion does not prove custom or the propriety of what someone else did on another occasion under different circumstances. See, *United States v. Sprengel*, 103 F.2d 876 (3rd Cir. 1939); *Commonwealth v. Irwin*, 475 Pa. 616, 381 A.2d 4-4 (1977); *Commonwealth v. Tirado*, 473 Pa. 468, 375 A.2d 336 (1977); 1 Henry, Pennsylvania Evidence, § 31, p. 36. Moreover, in the context offered, without a comparison to the total number of estates filed, the statistical data was meaningless.

5.

Defendant Booras complains about the exclusion of other evidence. The testimony of Robert Kerrigan, to the effect that the decedent had charged him with overseeing defendant Booras' expenditures of the money the decedent had given him (N.T. 12.108), was a classical example of hearsay. See *Commonwealth v. Cassidy*, 315 Pa. Super. 429, 462 A.2d 270 (1983); *Commonwealth v. Perry*, 279 Pa. Super. 32, 420 A.2d 729 (1980). Nor did it qualify, as contended, under the state of mind exception

to the hearsay rule; what the decedent had told Mr. Kerrigan out of defendant's hearing could have had no bearing on defendant's state of mind.

Defendant Booras testified several times over that he believed that the contents of the decendent's residence belonged to him. He complains, however, that he was not permitted to testify concerning the claims to the money and jewelry he filed in the Orphans' Court and federal court. The evidence was inadmissible because it was hearsay, see, *Commonwealth v. Cassidy*, supra, *Commonwealth v. Perry*, supra, self-serving, *Commonwealth v. Murphy*, 493 Pa. 35, 425 A.2d 352 (1981), non-probative and irrelevant to defendant's intent at the time of the crime. In any event, the fact that he made claims for the items was communicated to the jury. (N.T. 10.192, 195).

The testimony of Betty Ann Staranowicz, to the effect that Kidd told her "if your father (defendant Booras) had come to me, this wouldn't have happened at all" and "I don't believe what Chryais Fiammetta told me" (N.T. 12.216-217), offered at the time to impeach Kidd's credibility (Id.), now disengenuously argued as having been offered to prove state of mind (Defendant Booras' Brief, pp. 51-53), was also properly excluded. A witness' prior statements are admissible only where they are inconsistent with his in court testimony and thereby impeach his credibility, *United States v. Hale*, 422 U.S. 71, 95 S.Ct. 2133, 45 L.Ed.2d 99 (1975), *Commonwealth v. Hamm*, 474 Pa. 487, 378 A.2d 1219 (1977), *Commonwealth v. Bailey*, 322 Pa. Super. 249, 469 A.2d 604 (1983), and there was no such inconsistency here. (See N.T. 12.141-212).

6.

Our ruling disallowing a demonstration by defendant Booras

purporting to show how the stacks of money appeared when found in the broiler pan was within our sound discretion, *Commonwealth v. Coccioletti*, supra, *Commonwealth v. Hudson*, 489 Pa. 620, 414 A.2d 1381 (1980), *Commonwealth v. Reardon*, 297 Pa. Super. 193, 443 A.2d 792 (1981), and proper.

The amount of currency found in the broiler pan was a subject of dispute from the very beginning. Fiammetta testified that the pan was filled with six to nine packets of $100.00 bills, each marked as containing $30,000.00; defendant Booras testified that there had been only three such packets and some unspecified pieces of jewelry. Defense counsel offered three packets of $1.00 bills, each containing $300.00, without any jewelry, purporting to demonstrate that the pan had not been full. As there was considerable dispute concerning the pan's contents and, without the inclusion of the jewelry, the demonstration would not have represented the testimony of either witness, we disallowed it. To qualify for admission, a demonstration must be substantially similar to the conditions prevailing ante litem motam, and, at the very least, must comport with the testimony of the would-be demonstrator. *Commonwealth v. Glass*, 486 Pa. 334, 405 A.2d 1236 (1979); *Commonwealth v. Sero*, 478 Pa. 440, 387 A.2d 63 (1978); McCormick, Evidence, § 202, pp. 485-486 (2d Ed. 1972).

IV.

Scope and Manner of Examination of Witnesses

1.

The Court did not abridge defendant Costigan's Sixth Amendment right to confrontation by refusing to permit cross-examination of Fiammetta on the names of the persons she

allegedly paid to avenge her brother's death and on her twenty-one year old conviction for cheating by false pretenses; nor did the Court err in limiting defendant Booras' attempts to impeach her with prior inconsistent statements.

Considering that Fiammetta was extensively and intensively grilled on cross-examination over the course of eight hours (for what constitutes more than 300 pages of testimony) on a variety of matters affecting her bias and interest, the claims verge on the frivolous. The witness was cross-examined on her use of an alias (N.T. 2.14-15, 20, 157), the extent of the immunity granted for her testimony (N.T. 2.44-45, 167-172), her animosity toward defendant Booras (N.T. 2.55-59, 87-90, 173-174, 252-254), her sanguine desire to avenge the decedent's death (N.T. 2-113, 133, 307), her relationship with Kidd and the law firm representing Teddy (Id., passim) numerous prior inconsistent statements (N.T. 2.53-54, 60-61, 72-73, 93-96, 193-194, 197-199, 201-202, 225-229, 283-286), and how she had spent the amount distributed to her, returning less than a quarter thereof. (N.T. 2.111-114, 116-121, 161-162, 238-251).

Under the circumstances, we did not believe it would have served the cause of discrediting the witness any more to have her name the individuals she claimed to have given money, so we exercised our prerogative of limiting cross-examination on the point. *Commonwealth v. Sisco*, 484 Pa. 85, 398 A.2d 955 (1979); *Commonwealth v. Orlowski*, ____ Pa. Super. ____, 481 A.2d 952 (1984); *Commonwealth v. Brown*, ____ Pa. Super. ____, 477 A.2d 1364 (1984). The names of the individuals were a collateral matter, obfuscating rather than enlightening, and had no relation to the issue; as such, they were properly excluded. See, *Commonwealth v. Fisher*, 447 Pa. 405, 290 A.2d 262 (1972); *Commonwealth v. Petrillo*, 341 Pa. 209, 19 A.2d 288 (1941); *Commonwealth v.*

Wright, 308 Pa. Super. 263, 454 A.2d 122 (1982); *Commonwealth v. Green*, 290 Pa. Super. 76, 434 A.2d 137 (1981).

The matter of Fiammetta's conviction in 1961 for cheating by false pretenses was simply too remote to have bearing on her credibility in 1982. See *Commonwealth v. Levene*, 492 Pa. 287, 424 A.2d 865 (1981) (convictions ranging in age from 16 to 34 years too remote); *Commonwealth v. Williams*, 286 Pa. Super. 444, 429 A.2d 22 (1981) (concurring opinion) (8 year old conviction stale); *Commonwealth v. Williams*, 273 Pa. Super. 389, 417 A.2d 704 (1980) (impeachment improper where crimes were 8 and 10 years old); *Commonwealth v. Summers*, 269 Pa. Super. 437, 410 A.2d 336 (1979) (convictions ranging in age from 25 to 32 years too remote). Nor is it correct that the *Bighum-Roots* line of cases applies only to defense witnesses. *Commonwealth v. Yost*, 478 Pa. 327, 386 A.2d 956 (1978); *Commonwealth v. Hoffman*, 301 Pa. Super. 312, 447 A.2d 983 (1982); *Commonwealth v. Summers*, supra; *Commonwealth v. Ashmore*, 266 Pa. Super. 181, 403 A.2d 603 (1979).

There is no substance to defendant Booras' argument that the Court erred in disallowing three of Fiammetta's prior inconsistent statements; the statements did not qualify for admission because they were not substantially and unequivocally inconsistent with her in court testimony, a determination to be made by the Court. See, *United States v. Hale*, supra; *Commonwealth v. Ryan*, 253 Pa. Super. 92, 384 A.2d 1243 (1979); *Commonwealth v. Hamm*, supra; 3A Wigmore, Evidence, § 1049, p. 1048 (Chadbourn rev. 1970). Considering the circumstances and context in which it was made, her prior statement that her share of the estate was "$80,000.00 or in the eighties somewhere" was not significantly different from her testimony that she received $79,000.00 or $80,000.00. (N.T. 2.229, 233-234). Her prior

statement that she believed defendant Booras had brought only 75% of the jewelry to defendant Costigan's office was not inconsistent with her testimony that she never told defendant Costigan that only 75% of the jewelry was present. (N.T. 2.256-257). Her testimony that she did not remember reading a certain document was not inconsistent with her prior statement that she remembered seeing Teddy's name in the document (N.T. 2.224-226); loss of memory on a point does not make a prior statement admissible for impeachment purposes. *Commonwealth v. Brown*, 302 Pa. Super. 391, 448 A.2d 1097 (1982); *Commonwealth v. Morris*, 273 Pa. Super. 477, 417 A.2d 748 (1979); *Commonwealth v. Hutchinson*, 269 Pa. Super. 24, 409 A.2d 45 (1979).

2.

Nor was the testimony of Carl Diering (Fiammetta's son-in-law) that he did not see the colander taken out of the broiler (N.T. 3.196-200) inconsistent with his prior statement to the police that "in the broiler there was a colander filled with jewelry"; knowing about the colander was not the same as seeing it when it was taken out. See, *United States v. Hale*, supra; *Commonwealth v. Ryan*, supra; *Commonwealth v. Hamm*, supra; 3A Wigmore, Evidence, supra.

3.

Defendants' objection that the Court allowed the prosecution too great a latitude in cross-examining Peter Christ can be understood in the following context.

Defendants' cross-examination had notably effected and sorely tested Fiammetta's testimony, imputing that it was

fabricated and derived from a corrupt source. It would have been entirely proper for the Court to have admitted the statements she had made to Christ, the F.B.I. agent to whom she had reported the criminal activities, in order to dispel the accusation of fabrication. See, *Commonwealth v. Byrd*, 490 Pa. 544, 417 A.2d 173 (1980); *Commonwealth v. Bailey*, supra; *Commonwealth v. Mokluk*, 298 Pa. Super. 360, 444 A.2d 1214 (1982); *Commonwealth v. Gore*, 262 Pa. Super. 540, 396 A.2d 1302 (1978). Instead, when the prosecutor called the witness in its case in chief, the Court, out of an abundance of caution, disallowed the evidence, ruling that when considered in the whole, Fiammetta's prior statements were only equivocally consonant. The Court cautioned, however, that if defendants chose to put into evidence that which when taken from the text of the statements could be deemed inconsistent, the whole of the statements would become admissible. (N.T. 4.71-114). Subsequently, when defendant Costigan called Christ as his own witness, the Court repeated its caution. (N.T. 9.162, 168). On direct examination, defendant elicited that on June 3rd, Fiammetta told Agent Christ that she had put money out on the street to avenge her brother's death, which purportedly contradicted her testimony that she had done so on June 4th, after the distribution of the money from the estate. (N.T. 9.171-178). From the vantage point of a cross-examiner, defendant Booras had the memorandum containing the statements marked and repeatedly referred to portions of the June 3rd statement. (N.T. 9.180-192, 198-201). On cross-examination by the Commonwealth, over defendants' objections, the rest of the memorandum containing Fiammetta's prior consonant statements on June 11th regarding the assets found in the decedent's house and their distribution in defendant Costigan's office, was read into evidence. (N.T. 9.204-213).

It was only fair that the whole of the statement have been

read; in the quest for truth, a party should not be permitted to fragment a statement made by a witness to a criminal event. In essence, whether a prior statement is inconsistent or consistent with a witness' in court testimony can be determined only from consideration of the whole text. *Moore v. United States*, 217 F. Supp. 289 (D.C. Pa. 1963), aff'd 332 F.2d 372; *Commonwealth v. Cruz*, 489 Pa. 559, 414 A.2d 1032 (1980); *Commonwealth v. Merbah*, 270 Pa. Super. 190, 411 A.2d 244 (1979); *Commonwealth v. Pettre*, 35 Leh. L.J. 404 (1974). Moreover, defendants having introduced and marked the statement in the first instance, they can hardly be heard to complain that the other party also availed itself of it. See generally, *United States v. Pantone*, 609 F.2d 675 (3rd Cir. 1979), appeal after remand 634 F.2d 716; *Commonwealth v. Beasley*, ____ Pa. ____, 479 A.2d 460, 463 (1984); *Commonwealth v. Bey*, 294 Pa. Super. 229, 439 A.2d 1175 (1982); *Commonwealth v. McCloughan*, 279 Pa. Super. 599, 421 A.2d 361 (1980).

The argument that there were two separate statements and that reference to the one on June 3rd did not open the door to the other on June 11th, is not convincing. The two statements were essentially one; they were made by the same person to the same witness and pertained to one criminal episode, which involved separate events taking place at different times. But, even if the statements are viewed as separate and discrete, it was harmless error and within our discretion to have admitted them when we did, rather than in rebuttal as defendants argue. See, *Commonwealth v. Stetler*, 494 Pa. 551, 431 A.2d 992 (1981); *Commonwealth v. Sisco*, supra; *Commonwealth v. Orlowski*, supra; *Commonwealth v. Mason*, ____ Pa. Super. ____, 471 A.2d 555 (1983); *Commonwealth v. Brown*, supra, 477 A.2d 1364; *Commonwealth v. Sutherland*, 305 Pa. Super. 1, 451 A.2d 1 (1982).

Appendix B

Defendant Booras' contention that the June 11th statement was unreliable and did not qualify as a prior consonant statement because it was made after Fiammetta misappropriated the funds entrusted to her and had a motive to lie, is neither legally nor factually correct. While evidence from an accomplice is said to proceed from a corrupt motive and must be scrutinized carefully, it is not excludable as such; the matter is one of weight, not admissibility. See generally, *Commonwealth v. Hudson*, supra; *Commonwealth v. Upshur*, 488 Pa. 27, 410 A.2d 810 (1980). Fiammetta did not cover up her complicity or misappropriations but implicated herself as well as defendants, a fact enhancing the reliability of her declarations. See generally, *Commonwealth v. Warren*, 250 Pa. Super. 522, 378 A.2d 1271 (1977); *Commonwealth v. Hackett*, 225 Pa. Super. 22, 307 A.2d 334 (1973).

Defendant Booras' additional claim that the Court unduly cut off his "redirect examination" of Agent Christ does not make sense; the witness had been called by defendant Costigan and cross-examined by defendant Booras. Insofar as defendant means that the restraint was on his recross-examination, the record (N.T. 9.224-229) shows that the questions disallowed were either argumentative or repetitious and well within our discretion to curtail, *Commonwealth v. Sisco*, supra, *Commonwealth v. Orlowski*, supra, *Commonwealth v. Brown*, supra, 477 A.2d at 1364, or directed at inadmissible alleged omissions from Fiammetta's statement. *Commonwealth v. Hammond*, 308 Pa. Super. 139, 454 A.2d 60 (1982); see also, *Commonwealth v. Bailey*, supra.

Last among the errors pertaining to examination of witnesses, defendant Booras objected that the prosecutor's cross-examination of Robert Caldwell and Betty Booras exceeded the scope of direct, and that his redirect examination of Detective Bittenbender went

beyond the scope of defendant's cross.

Robert Caldwell, the stepson of defendant Booras, and Detective Bittenbender, a homicide detective, had been present the night the money and jewelry had been found. As Caldwell testified that the broiler pan had contained three packets of money, thereby supporting defendant Booras' contention that all of its contents were taken to defendant Costigan's office and distributed, the cross-examination question as to whether defendant told him the amount distributed (N.T. 12.105-106) was on point. An affirmative answer, when collated, would have determined whether defendant told the truth about the contents of the broiler pan or had bilked some of the money as testified to by Fiammetta.

Nor did the prosecutor exceed the scope of direct examination in cross-examining Betty Booras, wife of defendant, who testified to the decedent's munificent gifts of money (N.T. 11.176-178), by referring to an alleged altercation between the decedent and defendant (N.T. 11.188-189); bad blood between the two would have cast doubt on whether the gifts were actually made.

In considering the propriety of the redirect question to Detective Bittenbender, it must be remembered that defendant Booras claimed to have been given the combinations to all the safes in the decedent's house. The detective testified that only one safe was opened the night of the search. On cross-examination, the defense elicited the response that the police did not ask defendant if he had the combination to the safe. On point, on redirect, the prosecutor properly elicited that defendant indicated he didn't know how many safes there were and that if he had indicated there were other safes, the police would have looked into them. (N.T. 3.43-44).

Appendix B

V.

Prosecutorial Misconduct

Defendants allege prosecutorial misconduct in the presentation of false evidence and in summation.

1.

There is no question that Fiammetta and her son-in-law testified before the grand jury under a grant of use and derivative use immunity.[11] Both testified at trial, however, that they had not been granted immunity for their trial testimony. (N.T. 1.213-214; 3.95). Contending that the grant of immunity continued and that the prosecutor knowingly permitted the witnesses to falsify, defendants moved for a mistrial. (N.T. 1.214-219; 3.95). Because the motion was denied, curative instructions were refused and the witnesses persisted on cross-examination that they had not asked for immunity and would have testified before the grand jury without it, (N.T. 2.41-46, 171-173; 3.99-101, 132-135), defendants now vie for a new trial.

To be sure, it is a most egregious error for the prosecutor to present evidence which he knows or has reason to know is not true; he has an affirmative duty to correct such testimony, even if the falsity goes only to credibility. *Napue v. Illinois*, 360

---

11. Section 5947 of the Judicial Code, 42 Pa. C.S.A. § 5947, governing the immunization of witnesses, provides for a grant of use and derivative use immunity. 42 Pa. C.S.A. § 5947(d); *Commonwealth v. Webster*, 323 Pa. Super. 164, 470 A.2d 532, 535, n.1 (1983); *Commonwealth v. Hawkins*, 322 Pa. Super. 199, 469 A.2d 252 (1983); see *In re County Investigating Grand Jury*, 495 Pa. 211, 433 A.2d 18, 20 (1981) (dissenting opinion, Larsen).

U.S. 264, 79 S.Ct. 1173, 3 L.Ed. 2d 1217 (1959); *Commonwealth v. Hollowell*, 477 Pa. 232, 383 A.2d 909 (1978); *Commonwealth v. Carpenter*, 472 Pa. 510, 372 A.2d 806 (1977); *Commonwealth v. Gaddy*, 468 Pa. 303, 362 A.2d 217 (1976); *Commonwealth v. Lipscomb*, 269 Pa. Super. 219, 409 A.2d 857 (1979). But, there was nothing false about the witnesses' testimony that they did not have immunity at trial. The argument that they were immunized in fact and in law because their trial testimony derived from their grand jury testimony is factually and logically flawed; the witnesses were granted use—not transactional—immunity for their grand jury testimony and their trial testimony derived from the events of the crime, not, as argued from their statements to the grand jury. Use immunity bars only the use of immunized testimony or information derived solely therefrom; it is transactional immunity that bars prosecution for the crime itself. *Kastigar v. United States*, 406 U.S. 441, 92 S.Ct. 1653, 32 L.Ed 2d 212 (1972), reh. denied, 408 U.S. 931, 92 S.Ct. 2478, 33 L.Ed. 2d 345 (1972); *Commonwealth v. Hawkins*, 322 Pa. Super. 199, 469 A.2d 252 (1983).

As a separate error related to the issue, defendants complain of the Court's refusal to admit two immunity petitions to contradict the witnesses' testimony that they had not requested immunity and would have testified without it.[12] As the petitions had been prepared by the District Attorney and were based upon statements by the witnesses' attorney which the witnesses had neither seen nor adopted, the petitions were not admissible as

---

12. The evidence having been offered for this purpose, defendants' argument that its exclusion compounded the error of presenting false testimony is unavailing. See *Commonwealth v. Pettiford*, 253 Pa. Super. 503, 385 A.2d 452 (1978); see also, *Commonwealth v. Stoltzfus*, 462 Pa. 43, 337 A.2d 873 (1975); *Commonwealth v. Frederick*, ____ Pa. Super. ____, 475 A.2d 754 (1984).

prior inconsistent statements. *Commonwealth v. Baez*, 494 Pa. 388, 431 A.2d 909 (1981); *Commonwealth v. Brown*, supra, 448 A.2d at 1097. Moreover, the information having been elicited gratuitously on cross-examination, impeachment on the point would have constituted impermissible collateral cross-examination. See, *Commonwealth v. Fisher*, supra; *Commonwealth v. Petrillo*, supra; *Commonwealth v. Doe*, 316 Pa. Super. 1, 462 A.2d 762 (1983); *Starr v. Allegheny General Hospital*, 305 Pa. Super. 215, 451 A.2d 499 (1982).

2.

The parties argue a total of fourteen incidents of misconduct in summation, of which only three bear the requisite objections preserving the points for appeal. *Commonwealth v. Williams*, 500 Pa. 226, 455 A.2d 632 (1983); *Commonwealth v. Shain*, 324 Pa. Super. 456, 471 A.2d 1246 (1984); *Commonwealth v. Humphreys*, 267 Pa. Super. 318, 406 A.2d 1060 (1979).

The point preserved by defendant Booras concerns the prosecutor's reference to subpoena: ". . .and what do we get from Costigan's office after we subpoena? We get DC-13 . . ."[13] (N.T. 13.115). The Court did not make the extrapolation that the reference had any sinister connotation and, perceiving no error, refused to advise the jury that a subpoena was the usual method of procuring evidence. (N.T. 13.145-146).

Defendant Costigan complains that the prosecutor "grossly misrepresented" the evidence by stating:

---

13. DC-13 was a memorandum prepared by defendant Costigan's associate to the effect that Fiammetta had told him, inter alia, that "Nick" (defendant Booras) had "carried out" $100,000.00 and a suitcase filled with jewelry and coins. (See N.T. 8.161-167).

Appendix B

> . . .what does his (Costigan's) mouth do, he meets with Jack Terrill and he doesn't tell him what the story is on June 9th and June 12th. And what does Costigan's mouth do, again tomorrow, on June 25th, *he admits to the crimes.* (N.T. 13.97) (emphasis added).
>
> . . .
>
> Costigan is caught on that day. Costigan is caught on that day *just as if he had written a ten-page confession.* (N.T. 13.136) (emphasis added).
>
> . . .
>
> Costigan is convicted by what he does say, what he doesn't say and by his actions. What he doesn't say to John Terrill on June 27th (sic) . . . What he doesn't say on June 12th . . . What he doesn't say, what he does say on June 25th, 1982, when *he confesses to his crime and his actions.* (N.T. 13.140-141) (emphasis added).

While a prosecutor may not misstate the evidence or attempt to mislead the jury, he is free to argue the legitimate inferences that reasonably flow therefrom, *Commonwealth v. Shain*, 493 Pa. 360, 426 A.2d 589 (1981), *Commonwealth v. Anderson*, 490 Pa. 225, 415 A.2d 887 (1980), *Commonwealth v. Brown*, ____ Pa. Super. ____, 480 A.2d 1171 (1984), and may present his arguments with logical force and vigor. *Commonwealth v. Zettlemoyer*, 500 Pa. 16, 454 A.2d 937 (1982); *Commonwealth v. Brown*, supra, 480 A.2d at 1171; *Commonwealth v. Parente*, 294 Pa. Super. 446, 440 A.2d 549 (1982). The inferences drawn here reasonably and fairly followed from the evidence that defendant failed to tell the heir's attorney about the largest and most significant assets

in the estate, admitting to their distribution only after being confronted on the point. But, be that as it may, the jury was instructed that the arguments and statements of counsel were not binding, that the evidence was as they recollected it, and that any statement not comporting with their recollection or any argument not appealing to their reason was to be disregarded. (N.T. 14.31-32).

Nor did the prosecutor inflame the jury's passions by arguing in reference to defendant Costigan's explanation for failing to divulge the money and jewelry,

> Ethics, lawyer-client privilege. Do you really believe that? If that is true, then maybe Shakespeare was right, they should do to the lawyer's (sic), (what) Shakespeare has suggested should be done to all the lawyers, really, (N.T. 13-132);

and in reference to defendant's thirty-odd character witnesses,

> And let me tell you about reputation testimony, ladies and gentlemen. Two thousand years ago, Judas, had he wanted to, could have, after he betrayed Jesus, gotten 12 people to testify in (c)ourt as to his reputation. He could have gotten the Apostles and Jesus himself to testify . . . to . . .his reputation . . . (for) truth, veracity and . . .being an honest and upright citizen. (N.T. 13.138-139).

Even if we make the unwarranted assumption that the jury recognized the cryptic allusion to Shakespeare's exhortation to "kill all the lawyers",[14] in context, the argument was but an

14. See Henry the Sixth, Second Part, Act IV, Scene II, line 84: "The first thing we do, let's kill all the lawyers".

exaggeration for the purpose of making the point that there could be no such rule that requires attorneys to affirmatively deceive. The comment on "Judas" was an appropriate and effective way to convey the value of reputation evidence. *State v. Lang*, 46 N.C. App. 138, S.E. 2d (1980); *Miles v. United States*, ____ D.C. App. ____, 374 A.2d 278 (1977), cited with approval in *Parks v. United States*, ____ D.C. App. ____, 451 A.2d 591 (1982); *Quaid v. State*, 132 Ga. App. 478, S.E. 2d (1974); *Wright v. State*, 279 Ala. 543, 188 So.2d 272 (1966), cited with approval in *Williams v. State*, ____ Ala. App. ____, 455 So. 2d 210 (1984).

VI.

Instructions to Jury

1.

In determining whether an instruction on a particular point is correct, it must be read in the context of the whole charge; no error can be predicated on an isolated excerpt. *Commonwealth v. Ohle*, 503 Pa. 566, 470 A.2d 61 (1983); *Commonwealth v. Davis*, ____ Pa. Super. ____, 480 A.2d 1035 (1984); *Commonwealth v. Melendez*, ____ Pa. Super. ____, 474 A.2d 617 (1984). Hence, in viewing the several complaints defendants make with respect to the Court's instructions on estate law, it must be noted that the jury was fully instructed and reminded that the purpose of the instructions in that area was merely to explain the background in which the offenses were set (N.T. 14.60-61), that defendants were not charged with any violation of estate law or Orphans' Court rules (N.T. 14.133-134), that the issue to be determined was defendants' guilt or non-guilt of conspiracy, theft, aiding consummation of a crime and unlawful entry into a safe deposit box, the elements of which were specifically defined (N.T.

14.53-58, 66-75, 78-81), and that a conviction depended on a finding of each element of the crimes beyond a reasonable doubt. (N.T. 14.50-52, 57, 69, 72, 74, 77, 78, 80-82).

Defendants have objected to the following portions of the Court's instructions:

> (a)ll estate funds held by the administrator as an administrator, which are not invested, are required to be held in banks, trust companies, or savings and loan associations, (N.T. 14.64);
>
> . . .
>
> . . . (u)nless there is agreement by all parties, including the heirs, the administrator can't buy the assets of an estate without court approval, (N.T. 14.64);
>
> . . .
>
> . . .To qualify as the. . .administrator of the estate and to administer the estate, the person must prove, first, of course, that the person whose administration is being conducted is dead. . . .Death is never presumed. Once there is life, one must prove death, (N.T. 14.61);
>
> . . .
>
> One of the defenses in this case was that the defendant believed that the rightful heir . . . was dead. Mistake as to matter of fac[illegible] . . . is a defense if it negatives the intent . . . And in regard to this, you will consider that the law, as I stated earlier, does not presume death. Once there is life, that

> continues until someone proves otherwise. If there has been a long period of time lapse when a person has not been heard from . . . then upon application to the Orphans' Court he may be declared dead and then letters may be obtained . . . and an estate created out of his assets. (N.T. 14.76-78).[15]

The argument is not that the instructions were per se incorrect. See Phila. O.C. Div. Rules 1500-1.13, 20 Pa. C.S.A. § 3356, 20 Pa. C.S.A. § 5701, respectively. Rather, defendants argue that because they admitted to deviating from the normal practices of estate administration, the instructions were tantamount to directing a verdict of guilty. The argument is facile, ill-conceived, false and absurd. When the passages are read in context, it is perfectly clear that the jury had to find the mens rea and all the elements of the crimes charged beyond a reasonable doubt. Nor does it follow that whenever a defendant confesses to acts constituting a crime, the court directs a verdict of guilty when it defines the crime.

Nor was it error to refuse three of defendant Costigan's points for charge.[16] Considering that "legal title" does not have the

---

15. The argument that the latter two passages suggested that defendants had committed a crime by obtaining letters of administration before the Orphans' Court declared Teddy Booras dead is a pure distortion of the text.

16. The claim that the Court should have instructed that administrators have a legal right to ignore their attorney's advice and maintain custody of the assets as they see fit is waived for want of inclusion in points for charge or objection at the end of the Court's charge. *Commonwealth v. Galloway*, 495 Pa. 535, 434 A.2d 1220 (1981); *Commonwealth v. Williams*, 463 Pa. 370, 344 A.2d 877 (1975).

special meaning to laymen that it has to attorneys, we refused to instruct that "legal title to all personal estate of a decedent, including cash and jewelry, shall pass at his death to his administrator . . ." (Points for Charge, p. 30). Given the freedom to fashion our own form of expression, *Commonwealth v. Ohle*, supra, *Commonwealth v. Cimorose*, ____ Pa. Super. ____, 478 A.2d 1318 (1984), *Commonwealth v. Freeman*, 295 Pa. Super. 467, 441 A.2d 1327 (1982), we charged that the administrator had the right to possess and control the assets of the estate. (N.T. 14.62-63). The other points, that ". . .there was nothing unlawful in the three administrators deciding . . .(to) maintain custody in equal measures of the cash . . ." (Points for Charge, p. 42), and " . . .(b)ecause the administrators are his clients, the attorney must abide by their lawful instructions" (Supplemental Proposed Jury Instructions, pp. 1-2), would have cast the Court in the role of an advocate and usurped the function of the jury, whose province it was to determine the lawfulness of those particular actions under the circumstances of the case.

2.

Defendant Booras' claim that the Court erred is instructing the jury on his defense is waived. Initially, the Court charged:

> . . .that the defendant believed that he was entitled to the contents of the home based on his understanding (that) because he owned the house . . . he owned the contents, that would not be a defense. Ignorance of the law is not a defense. . . .It may be a defense if one acts, takes property of another under the mistaken belief of a fact . . . Mistake as to matter of fact . . . is a defense if it negatives the intent. So . . . if one acts under

Appendix B

> a reasonably mistaken fact . . . then it might negate intent. And if it does negate intent, . . . then theft is not made out . . . (N.T. 14.75-76).

On defendant's insistence that his defense was mistake not of law, but of fact, (N.T. 14.86-89, 114-118), even though the matter had been covered, the Court added:

> . . . that defendant Booras professed belief that the contents of the house were his, may be considered by you as a defense negating the intent required . . . only if you conclude that it was a mistake of fact as I have defined mistake of fact for you . . . (N.T. 14.130).

Defendant's acceptance of this correction, which conformed with his request (N.T. 14.128), constitutes a waiver of the right to complain. *Commonwealth v. Murphy*, supra; *Commonwealth v. Brown*, 234 Pa. Super. 119, 338 A.2d 659 (1975); see generally, *Commonwealth v. Gilman*, 485 Pa. 145, 401 A.2d 335 (1979); *Commonwealth v. Martinez*, 475 Pa. 331, 380 A.2d 747 (1977).

Since in his brief defendant merely lists verbatim the 25 points for charge refused by the Court, without argument on why the refusal was error, no meaningful review can be had and any error in refusing to so charge is waived. See and compare, *Commonwealth v. Bossick*, 305 Pa. Super. 196, 451 A.2d 489 (1982); *Commonwealth v. Sanford*, 299 Pa. Super. 64, 445 A.2d 149 (1982). However, we will respond to three of the points, which defendant addressed at oral argument. As framed, point No. 16, to the effect that prior inconsistent statements are admissible only to test a witness' credibility, was more in the nature of a rule of evidence than an instruction to the jury; instead, the jury was

instructed "(i)t is proper in testing for credibility . . . to consider . . . any prior inconsistent (statement) . . .". (N.T., 14.36-37). Point No. 39, to the effect that the law requires a casual connection between deception and withholding, was also covered when the Court defined theft by deception, stating, "a person is guilty of theft if he intentionally obtains or withholds property of another *by* deception" (N.T. 14.70, see also 71-72) (emphasis added). Point No. 42, that "I charge you as a matter of law that it may not have been improper for . . . (defendant) to commingle his personal assets with the assets he received from Mr. Costigan" is clearly not the law. It is the mere commingling of funds that is insufficient to prove a theft, *Commonwealth v. Fritz*, supra, *Commonwealth v. Crafton*, supra; here, the evidence showed more than a mere commingling and the proposed instruction would have been improper.

3.

Defendant Costigan's complaint that the Court erred in failing to charge that,

> "(i)f an attorney representing administrators is consulted by another attorney who states that he represents an heir, the attorney . . . is not required to reveal any information about the estate (and) . . . is not allowed to reveal the information if the administrators object" (Points for Charge, p. 51),

and that,

> "(a)n attorney has the obligation to preserve the confidences of a client" (Supplemental Proposed Jury Instructions, p. 2),

is unfounded. An administrator or an attorney employed thereby is a fiduciary and owes a duty of loyalty and full disclosure to the heir. See *In re Kurkowski's Estate*, supra; *In re Comerford's Estate*, supra. If the attorney-client confidence exists in estate matters, where full and public disclosure of the assets must be made to the State, then in this case the estate and in particular the heir was the client. Given the facts of the case, the requested points for charge would have been contradictory to the applicable law. Moreover, our refusal to so charge actually inured to defendant's benefit, since to be complete such an instruction would have had to include the language that there is no duty of confidentiality in the furtherance of an unlawful scheme. Code of Professional Responsibility, DR 4-101(c); *In re Grand Jury Proceedings,* supra; *In re Westinghouse Elec. Corp. Uranium Contracts Litigation*, supra; *Commonwealth v. Trolene*, supra.

The contention that the Court erred in charging that defendants were interested witnesses and vitally concerned in the outcome of the case without also charging on the interests of the Commonwealth witnesses deriving from their immunization, economic incentives and animosity against defendant Booras, is without basis in law or fact. The law is clear that the interest of a defendant is a factor for the jury to consider in assessing credibility and that the court may so instruct, *Commonwealth v. Finnegan,* 280 Pa. Super. 584, 421 A.2d 1086 (1980), *Commonwealth v. Harley,* 275 Pa. Super. 407, 418 A.2d 1354 (1980), *Commonwealth v. Gilbert*, 254 Pa. Super. 579, 386 A.2d 101 (1978), and the jury was instructed to consider whether any witness had a motive or bias to color their testimony and whether they had made any prior inconsistent statements, and that Fiammetta and Henry Booras were accomplices whose testimony proceeded from a corrupt source. (N.T. 14.35-39).

Appendix B

VII.

Voir Dire

1.

Within the limits established by the purpose of voir dire, the method of examination and the scope of the inquiry is entirely within the trial court's discretion. *Commonwealth v. Box,* 481 Pa. 62, 391 A.2d 1316 (1978); *Commonwealth v. Hamm,* ____ Pa. Super. ____, 473 A.2d 128 (1984); *Commonwealth v. Richmond,* 316 Pa. Super. 304, 462 A.2d 1362 (1983); *Commonwealth v. Richardson,* 315 Pa. Super. 349, 461 A.2d 1315 (1983); *Commonwealth v. Silvis,* 307 Pa. Super. 75, 452 A.2d 1045 (1982); Pa.R.Crim.P. 1106(e)(1)(A). The short answer to defendants' complaint that the extensive pre-trial publicity necessitated an individual voir dire is that the Court did conduct an individual and private examination at sidebar of each prospective juror who indicated a familiarity with the case as a result of the media attention. While the case had received considerable publicity some sixteen months earlier, there was little or none at the time of trial.

2.

Contrary to defendant Costigan's contention, the Court did not err in refusing to ask the panel, "Do you have an opinion as to the honesty of attorneys in general?"; the question was overly broad, unnecessary and collateral to the quest. On a voir dire, the issue is not whether a prospective juror has an opinion about the reputation of a particular group of people, but whether he has any fixed opinion about the defendant which would prevent him from being fair. *Commonwealth v. Arnold,* ____ Pa. Super.

____, 480 A.2d 1066 (1984); *Commonwealth v. Howard,* 324 Pa. Super. 443, 471 A.2d 1239 (1984); *Commonwealth v. Rough,* 275 Pa. Super. 50, 418 A.2d 605 (1980). This was explained by the Court with great care. (N.T. 11/15/82, pp. 43, 46-47, 54-55). Those prospective jurors having relatives or friends who were attorneys or who had any experiences or contacts with lawyers were questioned as to prejudice at sidebar, thereby serving the purpose of the voir dire and avoiding the irrelevant and collateral issue of what people generally think about lawyers.

3.

There is no merit to defendant Costigan's contention that the Court improperly denied challenges for cause as to four prospective jurors, each of whom was peremptorily dismissed.

A challenge for cause lies and a prospective juror will be excused only where he indicates by his answers that he will not be impartial or where, irrespective of his answers, the court should presume a likelihood of prejudice due to his close relationship, be it familial, financial or situational, with any of the parties, counsel or witnesses. *Commonwealth v. Stamm,* 286 Pa. Super. 409, 429 A.2d 4 (1981); *Commonwealth v. Bright,* 279 Pa. Super. 1, 420 A.2d 714 (1980). The burden is on the defendant to demonstrate an actual and unyielding prejudice. *Commonwealth v. Arnold,* supra. An initial expression of bias or doubt concerning a prospective juror's ability to be fair does not warrant his dismissal if he subsequently indicates that he can discard the bias and render a decision based solely on the evidence. *Commonwealth v. Howard,* supra; *Commonwealth v. Short,* 278 Pa. Super. 581, 420 A.2d 694 (1980); *Commonwealth v. McBee,* 267 Pa. Super. 49, 405 A.2d 1297 (1979). The assessment of a juror's demeanor and the determination that he can and will be fair is within the

court's sound discretion. *Commonwealth v. Croll,* ____ Pa. Super. ____, 480 A.2d 266 (1984); *Commonwealth v. Westerfer,* 308 Pa. Super. 494, 454 A.2d 633 (1983); *Commonwealth v. Boone,* 286 Pa. Super. 384, 428 A.2d 1382 (1981); *Commonwealth v. Clark,* 280 Pa. Super. 7, 421 A.2d 374 (1980).

No cause was shown for excusing William Blue, who indicated that he had read newspaper accounts of the decedent's death and "relatives or somebody breaking in" (N.T. 11/15/82, p. 171); although he at first stated "I think I could (be fair) . . . (b)ut I don't know . . ." (Id., p. 172), upon further inquiry, he unequivocally stated that he could and would be fair and act only upon information presented in court. (Id., p. 173). See and compare, *Commonwealth v. Thomas,* ____ Pa. Super. ____, 477 A.2d 501 (1984).

Nor was Margaret Jackson[17] disqualified because she, too, had read about the case; she stated that she would not let it interfere with her ability to be fair. (N.T. 11/15/82, p. 88). While her sister-in-law was a secretary in Kidd's office, she herself did not know him and had not seen him in five years, and she positively stated that she would scrutinize his testimony like that of any other witness. (Id., pp. 87, 89).

Although Gordon Smith, a retired Philadelphia policeman, recognized Detective Metsos as someone he had known casually, he was confident that he could evaluate his testimony like that

---

17. There is a question whether the issue as to this juror is preserved, since it was the co-defendant who voiced an objection and challenged the juror for cause. (N.T. 11/15/82, pp. 93, 95-96). *Commonwealth v. Woods,* 215 Pa. Super. 392, 418 A.2d 134 (1980) (objection by co-defendant does not preserve issue for defendant). However, since defendant chimed in during the discussion on the challenge (Id., p. 96), we accord him the benefit of the doubt.

of any other witness. (N.T. 11/15/82, pp. 161-163). In fact, however, Detective Metsos had been involved only in the homicide aspect of the investigation and would not be a witness in the case. (Id., p. 164).[18]

Nor was there cause to excuse Joseph Kelly, who had retired from the police force ten years earlier, had a son who was also a former policeman and two cousins (whom he saw infrequently) who were still on the force, and had had an unpleasant experience with an attorney; he unequivocally assured the Court that he could be fair, that he would consider nothing extraneous of the evidence, and that he would set aside his feelings vis-a-vis lawyers. (N.T. 11/15/82, pp. 151-152). Individuals connected with law enforcement are not ipso facto disqualified as jurors. *Commonwealth v. Jones,* 477 Pa. 164, 383 A.2d 874 (1978); *Commonwealth v. Colon,* 223 Pa. Super. 202, 299 A.2d 326 (1972).

VIII.

Booras' Other Assignments of Error

1.

Defendant Booras' contention that the bills of information charging theft were duplicitous and the Court erred in denying his motion to quash is conjured and unfounded.

The argument proceeds from the assumption that the bills

---

18. Although in his brief and oral argument defendant made much ado about the fact that Mr. Smith had also testified in court on hundreds of occasions and had three sons who knew Ronald Kidd's son, the challenge for cause was based solely on the juror's familiarity with Detective Metsos. (Id., pp. 163-165).

charged theft by "receiving" and "concealing". However, neither the bills themselves (which followed the language of the Crimes Code) nor the bill of particulars (which referred to property "taken" and "removed") contained these allegedly duplicitous words. Even if the bills had read as claimed, the conceptualization of "receiving" and "concealing" as duplicitous does not follow, since the terms refer to the same property, are merely the different means by which it could have been stolen, and do not charge separate and distinct offenses with respect thereto.[19] See and compare, *United States v. Oxford Royal Mushroom Products, Inc.*, 487 F. Supp. 852 (D.C. Pa. 1980); *United States v. Raff*, 161 F. Supp. 276 (D.C. Pa. 1958); *Commonwealth v. Carson*, 21 Pa. Super. 48 (1902). Duplicity is the technical fault of pleading two or more separate and distinct offenses in the same bill or count. *United States v. Ellis*, 595 F. 2d 154 (3rd Cir. 1979); *United States v. Starks*, 515 F.2d 112 (3rd Cir. 1975); *Commonwealth v. Sutton*, 171 Pa. Super. 105, 90 A.2d 264 (1952).

2.

The first part of defendant Booras' argument that his conviction for unlawful entry into a safe deposit box should be reversed is incomprehensible and defies logical analysis. While he decries the legislature's failure to make scienter an element of the offense[20] and the imposition of criminal liability without

19. There were two theft incidents; the theft of the money on June 4th and the theft of the jewelry on June 8th. There were six bills of information covering the two incidents and expressing the ways by which the thefts could have been committed: by unlawful taking, deception and failure to make required disposition. If there was error at all, it was in the multiplicity of expressing the thefts, not duplicity.

20. 72 P.S. § 2485-1151 provides:

(Cont'd)

criminal intent, he disclaims any challenge to the constitutionality of the statute. As a result, all that can be said is that the courts have recognized the legislature's authority to establish criminal penalties for violations of laws enacted to regulate (for the public good) certain areas of social activity and commerce without requiring proof of criminal intent. *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 98 S.Ct. 2864, 57 L.Ed.2d 854 (1978); *Commonwealth v. Koczwara*, 397 Pa. 575, 155 A.2d 825 (1959); *Commonwealth v. Black*, 251 Pa. Super. 539, 380 A.2d 911 (1977).

While inartfully framed, the second leg of defendant's challenge, that the conviction is unlawful and should be overturned because it is the product of selective prosecution, has a legal basis; what it lacks is the predicate to make out a case of selective prosecution. To show a violation of due process and equal protection of the law, defendant must prove that the prosecutor intentionally or purposefully singled him out based on some arbitrary or unjustifiable classification and that others in similar situations were not prosecuted. *United States v. Torquato*, 602 F.2d 564 (3rd. Cir. 1979); *United States v. Lewis*, 514 F. Supp. 169 (D.C. Pa. 1981); *United States v. Shobar*, 489 F. Supp. 393 (D.C. Pa. 1979); *Commonwealth v. Stauffer*, 309 Pa. Super. 176, 454 A.2d 1140 (1980); see *Commonwealth v. Kellie*, 275 Pa. Super. 106, 418 A.2d 634 (1980). A showing of a mere failure to prosecute

---

(Cont'd)

> Any person other than an employee of a financial institution in which the safe deposit box of a decedent is located, who, having actual knowledge of the death of the decedent, enters a safe deposit box of the decedent in violation of the provisions of this Article, shall be guilty of a misdemeanor and, on conviction thereof, shall be sentenced to pay a fine not exceeding ten thousand dollars ($10,000.00) or undergo imprisonment not exceeding one (1) year, or both.

others similarly situated is insufficient. See *United States v. Standefer,* 452 F. Supp. 1178 (D.C. Pa. 1978); *United States v. Ahmad,* 347 F. Supp. 912 (D.C. Pa. 1972); *Kroger Co. v. O'Hara Tp.,* 243 Pa. Super. 332, 326 A.2d 427 (1974). The evidence offered here, to wit, the absence of reported cases, the affidavit of the trial prosecutor to the effect that he has no personal knowledge of any such prosecutions and that a search to make the determination would require an unduly burdensome review of all prosecution files, and the testimony that the Department of Revenue customarily obtains a notarized statement of the purpose of entry where such is made after the box owner's death, falls woefully short of the proof required.

3.

On the eleventh day of the fifteen day trial, defendant Booras filed a petition requesting that the Court recuse itself because of bias, listing eight areas of disagreement with the Court's rulings.[21] Upon denial of the petition, defendant unsuccessfully sought review in the Superior Court (No. 305 Miscellaneous Docket No. 13), and, clinging to his ill-conceived notion, continues to press the issue.

The bias which will require the recusal of a judge must stem from an extrajudicial source, to wit, a source beyond the scope of the proceedings; a judge's rulings at trial do not constitute grounds for recusal because they can be corrected by reversal on appeal. *United States v. Grinell Corp.,* 384 U.S. 563, 86 S.Ct.

---

21. The petition also complained that the Court's statements and actions castigated and ridiculed defense counsel, but defendant has not briefed or argued this point and does not rely upon it in support of his claim. See *Commonwealth v. Manigault,* 501 Pa. 506, 462 A.2d 1221 (1984).

1698, 1710, 16 L.Ed.2d 788 (1966); *Johnson v. Trueblood,* 629 F.2d 287 (3rd Cir. 1980), cert. denied, 450 U.S. 999, 101 S.Ct. 1704, 68 L.Ed.2d 200 (1981); *Municipal Publications, Inc. v. Snyder,* 322 Pa. Super. 464, 469 A.2d 1084, 1094 (1983), see *Commonwealth v. Krasner,* 285 Pa. Super. 389, 427 A.2d 1169 (1981); *Commonwealth v. Smith,* 274 Pa. Super. 280, 418 A.2d 406 (1980); *Commonwealth v. Lee,* supra. Here, since five of the eight rulings claimed to reveal the Court's bias are not raised as independent error,[22] defendant can hardly argue that they were indicative of prejudice. The remaining rulings, concerning the admissibility of prior inconsistent statements, cross-examination of Fiammetta and the defense witnesses, and prosecutorial misconduct on the topic of immunity, have been addressed heretofore.

IX.

Costigan's Other Assignments of Error

1.

Defendant Costigan adds three other assignments to his jeremiad, the first, that he was denied due process of law by the preliminary hearing court's refusal to allow expert testimony

---

22. Defendant does not contend that: (1) the Court erred in applying the law that the jury may not convict where the evidence is as consistent with innocence as it is with guilt; (2) the Court's use of sidebar conferences denied him the opportunity to create a complete record; (3) the prosecutor committed misconduct prior to trial and the Court erred in refusing to conduct an evidentiary hearing thereon; (4) the Court erred in excusing juror #12 mid-trial; or (5) the Court's manner of referring to defendant in its charge was improper.

from George Nofer, Esquire, on the topic of estate administration.[23]

First, it must be noted that a preliminary hearing is not constitutionally mandated, *Commonwealth v. Mayberry,* 469 Pa. 91, 327 A.2d 86 (1974), *Commonwealth v. Flanders,* 247 Pa. Super. 41, 371 A.2d 1316 (1977). *Commonwealth v. DeCosey,* 246 Pa. Super. 412, 371 A.2d 905 (1977), and that where, as here, the charges against a defendant emanate from an investigative grand jury presentment, there is a serious question about his entitlement to a preliminary hearing at all. *Commonwealth v. Bestwick,* 489 Pa. 603, 414 A.2d 1373 (1980); *Commonwealth v. McCloskey,* 443 Pa. 117, 277 A.2d 764 (1971), cert. denied 404 U.S. 1000, 92 S.Ct. 559, 30 L.Ed. 2d 552; *Commonwealth v. Iacino,* 265 Pa. Super. 375, 401 A.2d 1355 (1979), aff'd 490 Pa. 119, 415 A.2d 61; *Commonwealth v. Levinson,* 239 Pa. Super. 387, 362 A.2d 1080 (1976), aff'd 480 Pa. 273, 281 A.2d 1062.

It is doubtful, too, whether an evidentiary ruling at the preliminary hearing stage survives the trial as an independent assignment of error. See and compare, *Commonwealth v. McCullough,* 501 Pa. 423, 461 A.2d 1229 (1983); *Commonwealth v. Ballard,* 501 Pa. 230, 460 A.2d 1091 (1983); *Commonwealth v. Rashed,* 496 Pa. 26, 436 A.2d 134 (1981); *Commonwealth v. Kyles,* 64 D&C 2d 494 (1973). After all, the sole purpose of a preliminary hearing is to determine whether there is cause—a prima facie case—for holding the defendant for trial; it is a means of protecting against unlawful detention. *Commonwealth v. Prado,*

---

23. The issue was raised in a motion to quash the preliminary hearing transcript, which Judge Hill heard and denied and the Superior Court declined to review (No. 13 Miscellaneous Docket No. 159), and again in a motion to quash the bills of information, which the undersigned heard and denied.

481 Pa. 485, 393 A.2d 8 (1978); *Commonwealth v. Beatty,* 281 Pa. Super. 85, 421 A.2d 1159 (1980); *Commonwealth v. Nacrelli,* 280 Pa. Super. 338, 421 A.2d 752 (1980). Accordingly, a defendant may call only those witnesses likely to negate the existence of a prima facie case. *Commonwealth v. Mullen,* 460 Pa. 336, 333 A.2d 755 (1975); Pa.R.Crim.P. 141(c)(3) and comment thereto.

Expert testimony is in the nature of hearsay and generally inadmissible, except when necessary to catalyze the fact-finding process. While the occasion might conceivably arise where expert testimony would be relevant at a preliminary hearing, it was not relevant here, where a prima facie case was primarily based on defendant's inculpatory actions and declaration, not on his deviations from the accepted practices of estate administration. Moreover, the normal practice was a matter of law and for judicial notice.

2.

The claim that the Court refused to conduct inquiries in two areas, one, collusive action between the prosecutor and Ronald Kidd to promise Fiammetta immunity and relieve her of the obligation to return her share of the assets, and two, the possibility of jury tampering, are straw issues and without substance.

The Court gave defendant every opportunity to establish the prosecutorial misconduct professed, both during and after the trial. (N.T. 11/12/82, pp. 158-159; 1.97-98). In fact, there was no such misconduct; the evidence was to the contrary. (See N.T. 2.29-46, 123-125, 161-162; 3.269-270; 4.42-45; 12.186-204). Had there been the slightest proof of such, defendant would not have failed to raise the issue directly and include it with the other allegations of misconduct. (See supra. pp. 30-35).

Appendix B

The jury tampering hypothesis is based upon the court reporter's representation one year after the verdict that during the course of the trial, an unidentified spectator inexplicably told her that Fiammetta had paid a heavy-set spectator (later determined to be one Esther Fullbright) the sum of $200.00 or $250.00. The Court had no intention of calling Fiammetta, but urged counsel that if he believed there had been jury tampering, he should investigate the matter. It is assumed that counsel pursued the cause to a dead end, for he offered no evidence to substantiate the hypothesis.

3.

Defendant Costigan's final assignment of error is the denial of his motion for a new trial based on after-discovered evidence.

Evidence that in May of 1983, six months after the trial, Henry Booras charged his daughter with the theft of certificates of deposit totaling $22,500.00, which he testified at the preliminary hearing he had received from Fiammetta at some point before October 19, 1981, and evidence that in the accounts he and Fiammetta filed as co-administrators on May 2, 1984, eighteen months after the trial, he accounted for having received $85,500.00 instead of the $80,000.00 he testified to at trial and Fiammetta failed to account for the $25,000.00 she testified to having received from defendant Booras for funeral expenses and instead made a claim for same, does not qualify as after-discovered evidence that would justify a new trial. To constitute after-discovered evidence warranting a new trial, the evidence must be such as to compel a different verdict, i.e., it must not be merely cumulative or go merely to impeachment. *Commonwealth v. Scott,* 503 Pa. 624, 470 A.2d 91 (1983); *Commonwealth v. Hugney,* 491 Pa. 222, 420 A.2d 422 (1980); *Commonwealth v. Kunkowicz,* ____ Pa.

Appendix B

Super. ____, 479 A.2d 1086 (1984); *Commonwealth v. Benson,* 317 Pa. Super. 139, 463 A.2d 1123 (1983); *Commonwealth v. Simpson,* 302 Pa. Super. 287, 448 A.2d 640 (1983).

Accordingly, we submit that none of the points raised has merit and that the sentences imposed be affirmed.

BY THE COURT:

s/ Angelo A. Guarino
GUARINO, J.

APPENDIX C—MEMORANDUM AND ORDER OF THE SUPERIOR COURT OF PENNSYLVANIA DATED DECEMBER 6, 1985

J-54008 (1985)

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 02183 Philadelphia 1984

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

ROBERT W. COSTIGAN,

Appellant

Appeal from the Judgment of Sentence of the Court of Common Pleas, Criminal Division, of Philadelphia County, No. 4908/4915 Mar. Term 1982.

Before: SPAETH, P.J., WIEAND and MONTGOMERY, JJ.

MEMORANDUM

Appellant Robert W. Costigan was convicted of theft, criminal conspiracy and related charges after a jury trial before the Honorable Angelo A. Guarino. Post-verdict motions were denied and appellant was sentenced to two to five years imprisonment. This direct appeal followed. Finding no merit to appellant's contentions, we affirm.

Appendix C

The instant charges arose out of an alleged scheme to divert cash and jewelry from the estate of Steven Booras to the personal use of appellant, the attorney representing the estate, and the brothers and sister of the decedent. One brother, John N. Booras, Jr., was similarly charged and the other brother and the sister of the decedent testified for the Commonwealth. On this appeal, the following issues are raised:

1. Whether the evidence is sufficient to sustain the convictions.

2. Whether the trial court erred in excluding appellant's proferred expert evidence concerning the administration of estates.

3. Whether the Commonwealth's evidence was insufficient since there was no expert testimony about estate administration.

4. Whether the trial court erred by disregarding appellant's defense of an ethical obligation to preserve client confidences.

5. Whether the court's instructions to the jury regarding estates were correct.

6. Whether prosecutorial misconduct in closing argument warrants reversal.

7. Whether the trial court improperly curtailed appellant's cross-examination of Chryais Fiammetta, sister of the decedent.

Appendix C

8. Whether the trial court improperly permitted the Commonwealth to cross-examine witness Peter Christ regarding the contents of a statement given to him by Fiammetta.

9. Whether the trial court's rulings during voir dire were incorrect.

10. Whether the trial court erred in denying appellant's motion for new trial based on newly discovered evidence.

We have thoroughly and carefully reviewed the briefs, the record, and the many volumes of testimony in this case and conclude that Judge Guarino's opinion ably disposes of these issues.[1] We therefore affirm the judgment of sentence.

Judgment of sentence affirmed.

---

1. The only issue not dealt with in Judge Guarino's opinion, whether the prosecutor improperly commented on the credibility of the Commonwealth's main witness, was not raised below and is therefore waived. Commonwealth v. Clair, 458 Pa. 418, 326 A.2d 272 (1974).

Appendix C

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 02183 Philadelphia 1984

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

ROBERT W. COSTIGAN,

Appellant

Appeal from the Judgment of Sentence of the Court of Common Pleas, Criminal Division, of Philadelphia County, No. 4908/4915 Mar. Term 1982.

Before: SPAETH, P.J., WIEAND and MONTGOMERY, JJ.

PER CURIAM:

Judgment of sentence affirmed.

FILED DEC. 6, 1985

APPENDIX D—ORDER OF THE SUPERIOR COURT OF PENNSYLVANIA DENYING APPLICATION FOR REARGUMENT DATED FEBRUARY 11, 1986

J-54008/85

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 2183 Philadelphia 1984

COMMONWEALTH OF PENNSYLVANIA,

v.

ROBERT W. COSTIGAN,

Appellant

ORDER OF COURT

AND NOW, this 11th day of February, 1986, Appellant's Application for Reargument is denied.

Per Curiam

APPENDIX E—ORDER OF THE SUPREME COURT OF PENNSYLVANIA DATED SEPTEMBER 16, 1986

SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

September 22, 1986

James D. Crawford, Esquire
SCHNADER, HARRISON, SEGAL & LEWIS
Suite 3600
1600 Market Street
Philadelphia, PA 19103

RE: Commonwealth of Pennsylvania v. Robert W. Costigan, Petitioner
NO. 244 E.D. ALLOCATUR DOCKET 1986

Dear Mr. Costigan:

This is to advise you that the following Order has been endorsed on your Petition for Allowance of Appeal, filed in the above captioned matter:

"September 16, 1986.

Petition Denied.

Per Curiam."

Very truly yours,

s/ Patrick Tassos
PATRICK TASSOS
Deputy Prothonotary

/mz
cc: Ronald Eisenberg, Esquire

APPENDIX F—ORDER OF THE SUPREME COURT OF PENNSYLVANIA DENYING PETITION FOR RECONSIDERATION DATED MARCH 9, 1987

SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

March 9, 1987

James D. Crawford, Esquire
SCHNADER, HARRISON, SEGAL & LEWIS
Suite 3600
1600 Market Street
Philadelphia, PA 19103

RE: Commonwealth v. Costigan, Petitioner
NO. 244 E.D. ALLOCATUR DOCKET 1986

Dear Mr. Crawford:

This is to advise you that the following Order has been endorsed on your Application for Reconsideration of Denial of Petition for Allowance of Appeal, filed in the above captioned matter:

"February 2, 1987.

Petition for Reconsideration Denied.

Per Curiam."

Very truly yours,

s/ Patrick Tassos
PATRICK TASSOS
Deputy Prothonotary

/mz
cc: Ronald Eisenberg, Esquire

APPENDIX G — OFFER OF PROOF - SUBMITTED AT TRIAL AND APPEARING AT R2069a

Defendant Robert W. Costigan respectfully offers George Nofer, Esquire, as an expert witness in probate and estate law and practice. Mr. Nofer will give expert testimony on the following points:

1. Definition of terms used in probate and estate administration, e.g., "administrator", "Letters of Administration", "probate estate", "risk distribution".

2. Procedure for appointment of an administrator. Preparation and contents of Petition for Grant of Letters of Administration. Need for expeditious administration. Valuation of estate assets. Out-of-state administrator.

3. Powers and duties of administrators: (a) title and possession of estate assets; (b) payment of administration expenses and debts of the estate; (c) preparation of tax returns and payment of taxes; (d) ultimately, an accounting and distribution to heirs or an accounting and transfer of assets to a successor administrator. Authority of co-administrators to perform particular responsibilities, including maintaining custody of estate assets, singly by delegation.

4. Appraisal of estate assets.

5. Propriety of division of custody of estate assets among multiple administrators.

6. Propriety of risk distribution or fair value purchase of estate assets by administrators.

7. Propriety of $10,000 retainer.

Appendix G

8. When disposition of estate assets is required.

9. Obligation of confidentiality owed by an attorney for estate administrators when dealing with strangers to the attorney-client relationship.

APPENDIX H — OFFER OF PROOF - SUBMITTED AT TRIAL AND APPEARING AT R2070a AND R2071a

Defendant Robert W. Costigan respectfully offers George Nofer, Esquire, as an expert witness in the practice of probate law and estate administration. Mr. Nofer is a partner in the law firm of Schnader, Harrison, Segal & Lewis and is presently the Administration Chairman of that firm's Estates Department. Mr. Nofer is a member of the American Bar Association Section on Real Property, Probate and Trust Law and is Co-chairman of its Committee on Specialization. He is also a member of the Pennsylvania Bar Association Section on Real Property, Probate and Trust Law and is a former Chairman of its Inheritance Tax Committee. He is also a member of the International Academy of Estate and Trust Law.

Mr. Nofer will give expert testimony on the following points:

1. He will define certain terms used in probate and estate administration, e.g., "administrator", "Letters of Administration", "short certificate", and "probate estate", in the context of their ordinary meaning and usage in the practice of estate administration.

2. He will describe the procedure for appointment of an administrator, including the preparation and contents of a Petition for Grant of Letters of Administration and the valuation of estate assets therein. He will explain the practical necessity of undertaking expeditious administration of an estate and the practical disadvantages of having multiple administrators and of having an out-of-state administrator.

3. He will describe the usual activities of administrators, including the management and investment of estate assets, payment of administration expenses and debts of the estate, preparation

of tax returns and payment of taxes, and, ultimately, an accounting and distribution to heirs or an accounting and transfer of assets to a successor administrator.

4. He will describe the procedure by which multiple administrators can hold joint title to estate personality but maintain individual custody by delegation.

5. He will explain why administrators should accomplish timely appraisal of estate assets.

6. He will describe the procedures whereby administrators can make a "risk distribution" of estate assets to apparent heirs, but retain the liability to account should someone other than the recipients prove to be actual heir.

7. He will describe the procedures whereby administrators make a fair value purchase of estate assets and will indicate that such purchases are not uncommon where administrators are relatives of the decedent and the purchased property has sentimental or keepsake value.

8. He will describe the prevailing custom or practice for calculation of an attorney's fee in respect of representation of administrators of an estate and will indicate that the legal fee is usually computed on the basis of a scheduled declining percentage of total assets. The customary fee on the first $270,930 of estate assests would be $11,877.90.

9. He will outline the schedule on which administrators dispose of state assets.

10. He will describe the practical necessity of preserving the

confidentiality of an estate's affairs in the face of inquiries from strangers and will indicate that this is particularly important where the decedent is reputed to be wealthy and dies a spectacular death.

APPENDIX I — REQUESTED POINT FOR CHARGE AT TRIAL-APPEARING AT R2123a AND R2124a

If an attorney representing administrators is consulted by another attorney who states that he represents an heir, the attorney representing the administrators is not required to reveal any information about the estate. However, it is the practice to reveal basic information if the attorney for the administrators is satisfied that the alleged heir is truthfully an heir *and* the administrators have no objection to his revealing the information. Even if the person is an heir, the attorney representing the administrators is not allowed to reveal the information if the administrators object. In this case, Mr. Costigan testified that when he met with Mr. Terrill, he was not satisfied that the man Mr. Terrill represented was the real son, and furthermore, he felt that his clients, the administrators, would object to his supplying full information about the estate. If you believe Mr. Costigan's testimony, then there was nothing improper in his not revealing all of the information. If Mr. ~~Terrill's~~ client was truly the son, and therefore the closest heir, there was available a ready course of action, namely, to file a petition with the Register of Wills asking that the appointment of the three administrators be revoked and that he or someone he would name, be appointed instead. The Register of Wills would then hold a hearing and if he were satisfied that the reported son was truly the son, he would grant his request, and the three administrators would then be obliged to account to the newly appointed administrator. This is what the son eventually did.

Appendix I

During the administration of an estate, the administrators have the sole right of possession of the decedent's assets, as opposed to the heirs. In fact, if an heir has in his possession an asset of the decedent, the administrators can demand that he turn it over to them, and can obtain a Court order to do so if necessary. Therefore, during the period of administration involved in this case, the three administrators had the sole right to take possession of the decedent's assets.

APPENDIX J — EXCERPT FROM CHARGE OF TRIAL JUDGE APPEARING AT R1966a AND R1967a

In conjunction with the circumstantial evidence concept the law states that generally speaking when a crime has been committed and a person thinks he is or may be accused of having committed it, and he conceals or covers up evidence of this criminality, such concealment is, under the circumstances, tending to prove his consciousness of guilt. Now such concealment and cover-up does not necessarily show a consciousness of guilt in all cases. It may be some innocent motive or other motive for doing what we call cover-up or concealment.

Whether the evidence of cover-up or concealment in this case should be looked at as tending to prove guilt depends upon the facts and circumstances surrounding the incidents in which you are called upon to review and which came to you from the witness stand, and especially upon the motives which prompted the concealment or the cover-up. Remember that's only a permissible inference which you may make. The jury does not have to make that inference from evidence of cover-up.